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No.

IN THE
SUPREME COURT of the UNITED STATES

LINDA K. WALKER
Petitioner

v.

KENNETH APFEL, COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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96 pp

QUESTION PRESENTED

Public Law No. 104-121, Section 105(b)(1) Contract with America Advancement Act of 1996 prohibits eligibility for benefits to Social Security and Supplemental Security Income claimants where drug and or alcohol abuse is material to the disability.

The question presented is whether methadone addiction in the course of prescribed treatment properly falls under the ambit of drug and alcohol abuse addressed by this law, or whether such an interpretation is contrary to the intent of the law and to the Social Security Administration's regulations, and adversely affects the rights and expectations of Social Security and Supplemental Security Income claimants.

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STATEMENT OF JURISDICTION

Pursuant to SCUS Rule 10, jurisdiction is based on the compelling ground that a United States Circuit Court has decided an important question of federal law arising from a federal statute that has not been, but should be, settled by this Court.

STATUTORY PROVISIONS AND GOVERNING REGULATIONS INVOLVED

Public Law No. 104-121, Section 105(b)(1) Contract with America Advancement Act of 1996 prohibits eligibility for benefits to Social Security and Supplemental Security Income claimants where drug and/or alcohol abuse is material to the disability.

20 C.F.R. 404.1535 requires the Social Security Administration to analyze whether a claimant would still be disabled if he or she stopped using drugs or alcohol.

Methadone treatment is specifically mentioned by the Social Security Administration as a recognized and acceptable form of substitution therapy (20 C.F.R. 416.937(c)).

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

Linda K. Walker (Petitioner)[1] filed an application for Disabled Widows Social Security disability and Supplemental Security Income benefits on March 8, 1994, alleging that she became unable to work because of spastic colon on January 1, 1998. A request for hearing was filed on August 24, 1994. On November 27, 1995, a hearing before an Administrative Law Judge (ALJ) was held when the possibility of amending the onset date to December 18, 1993, consistent with the date of death of Petitioner's husband, was raised.

No decision was issued by the ALJ pending a change in the law relating to D & A abuse. On September 17, 1996 a notice was sent to Ms. Walker putting the burden[2] on her to show that D & A was not a material factor in her disability. A supplemental hearing was held before the same ALJ on April 2, 1997.

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[1] Deceased. See paragraph 6 this section

[2] In fact **the burden is on the Social Security Administration** to show such materiality (20 C.F.R. 404.1535; 416.935).

A decision was issued by the ALJ on June 28, 1997 finding that Ms. Walker is disabled under Sections 202(e) and 223 of the Act but that drug abuse was material to her disability, and that she would not be disabled if she stopped engaging in drug abuse; and denying her benefits.

The decision was appealed and an appeal brief was filed on April 3, 1998. On January 19, 1999, a "form" denial of the request for review was issued by a non-judge Appeals Officer on behalf of the Appeals Council, with no substantive review of the evidence or counsel's argument, other than a statement that it had been considered. This denial was the final decision of the Commissioner of the Social Security Administration, and Petitioner exhausted her administrative remedies.

An action for judicial review was filed by and through counsel in Federal Court pursuant to §1631(c)(3) of the Social Security Act, 42 U.S.C. §1383 on March 22, 1999. The District Court affirmed the decision of Respondent in its Memorandum Opinion dated November 4, 1999, and an Order was entered on November 4, 1999.

In the interim Ms. Walker died of untreated peritonitis on October 5, 1999. Petitioner's mother, Ms. Lois Myers, as next of kin, is entitled to benefits in the Title II Social Security claim (42 U.S.C.A. 404(d)(3)) through September 1999, the month before her death (20 C.F.R. 404.316(b)(1)). The claim is therefore continued by administratively substituted party, Ms. Lois Myers, Ms. Walker's mother. Reference to Petitioner is intended to apply to the administratively substituted party in Ms. Walker's behalf.

A panel decision was issued by three members of the United States Court of Appeals for the Eleventh Circuit on September 15, 2000 affirming the final administrative decision. A Petition for Rehearing en Banc was denied by the same members on December 8, 2000.

B. STATEMENT OF THE FACTS

Petitioner, Ms. Walker was 54[3] at the time of the ALJ decision with a GED but no past relevant work history. She had a long history of intermittent solid food dysphagia from at least 1991. She also had a long psychiatric history involving overdosage of prescription medication and alcohol ingestion seen as suicidal gestures going back to at least 1964. Detailed psychiatric progress notes through the 1970s, 80s, and early 90s show multiple admissions, prescriptions for Ritalin through 1976 and continued prescriptions for Tofranil, Valium, Restoril, and Darvon/Darvocet by the same physician. From early on, it was noted that there was a considerable degree of underlying depression.

In recognition of her substance abuse, Ms. Walker began Methadone treatment in October 1992. Ms. Walker's husband died on December 18, 1993. She filed for widow's and Supplemental Security Income disability benefits in March 1994. By the time of a physical consultative examination on behalf of the Social Security Administration in July 1994 she was noted to be "obviously on Methadone." The internist listed depression and anxiety first and second in his impressions as the major component.

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[3] Date of Birth November 19, 1942.

Ms. Walker testified that she stopped drinking after her husband died and the medical records in 1995 show only a past history of alcoholism. By the time of a psychological evaluation in July 1996 she was on Methadone and Reglan[4]. As reported by the ALJ, her treating physician for chronic esophagitis recommended in February 1997 that she continue this regimen to include **both** medications.

Ms. Walker denied illicit drugs and alcohol upon consultative examination in April 1997. It was noted that she "gives history of depression from an early age." She was diagnosed with Major Depression, recurrent with generalized anxiety features and assessed as having marked restrictions in her ability to function, as summarized by the ALJ, on a sustained basis in a routine work setting or elsewhere.

The ALJ determined that Ms. Walker is unable to engage in substantial gainful activity because of drug dependency. He did not include depression or anxiety as severe impairments, noting that they were "subjective complaints." If she stopped taking drugs (presumably Methadone), according to the ALJ she was otherwise able to engage in light work.

The United States District Court found that she would not be disabled if she stopped Methadone **because** she would still have a dependency for the drugs she took in the first place. The Eleventh Circuit found that the CAAA was applicable to Ms. Walker's claim based on the ALJ's rationale.

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[4] A prescription medication for gastroesophageal reflux (Physicians Desk Reference, 46th Ed, page 1870).

With no past relevant work, and a residual functional capacity for the full range of light work at the age of 55, Ms. Walker would be disabled under Medical Vocational Rule 202.04 (20 C.F.R. Part 404, Subpart P, Appendix 2).

SUMMARY OF THE ARGUMENT

The evidence of record establishes that Ms. Walker's opiate abuse ceased some time in 1992 at the time of entry into Methadone treatment and that drinking had stopped by the time of her husband's death in December 1993. There is no evidence of record to establish that Ms. Walker was addicted to any other drug than Methadone during the period at issue. This type of addiction does not fall within the ambit of drug and alcohol abuse targeted for regulation by Congress which prohibits payment of benefits to Social Security and Supplemental Security Income claimants where such use is material to the disability. Methadone is a form of treatment recognized by the Social Security Administration itself. The Social Security Administration's own policy mandates that a claim cannot be denied simply on the basis of methadone dependence. Even if Methadone addiction were to be considered drug abuse, according to medically recognized standards, maintenance on Methadone would not resolve or have any effect on otherwise disabling mental impairments of anxiety and depression.

The Social Security Administration is required to analyze whether a claimant would still be disabled if he or she stopped using drugs or alcohol, which if material to the disability preclude eligibility for Social Security and Supplemental Security Income benefits. Based on this provision, the ALJ concluded that Ms. Walker would not be disabled if she stopped taking Methadone; the United States District Court speculated that she would not be disabled if she

stopped Methadone because she would still have a dependency for the drugs she took in the first place, that Court's rationalization therefore focussing on drugs she might take rather than drugs she legitimately does. The Eleventh Circuit found that the CAAA was applicable to Ms. Walker's claim based on the ALJ's rationale. All three entities erred in misapplying C.F.R. 404.1535 in the context of methadone addiction.

REASONS FOR GRANTING THE WRIT

I.

METHADONE THERAPY IS A PRESCRIBED FORM OF TREATMENT RATHER THAN DRUG ABUSE.

Methadone maintenance is as much a prescription and course of treatment to be followed as any other physician orders. In fact, Methadone maintenance services are funded in many states by Medicaid, and it has been held that once a state approves such a program for Medicaid funding, it is to be made available in the same way as any other medical service. Sobky v. Smoley, 855 F.Supp. 1123 (E.D. Cal. 1994). One can certainly question the efficacy and even ethical merit of keeping a patient in a Methadone program for so long especially in view of the fact that Methadone itself is addictive. However, if Ms. Walker had not attended the Methadone Maintenance program, particularly in light of her treating physician's recommendation to continue, the ALJ or any other representative of the Social Security Administration arguably could have determined her automatically not disabled for failure to follow prescribed treatment that could restore the ability to work. Lucas v. Sullivan, 918 F.2d 1567, 1571 (11th Cir. 1990); (20 C.F.R. 404.1530; 416.930).

There is no evidence of record to establish that Ms. Walker regularly engaged in any type of drug use other than Methadone for the period under consideration and the ALJ erred in finding she would not be disabled if she stopped taking it.

The medical evidence establishes that Ms. Walker was on Methadone maintenance for **prior** pain and analgesic medication abuse, much of which had been prescribed over at least a twenty year period by a treating physician. An assessment from the Methadone Treatment Center in October 1994 included a notation that Ms. Walker was a candidate for continued Methadone maintenance on the basis that the patient was functional while on Methadone. This observation was significant because the other choices for continued candidacy were on the basis that either patient is poorly motivated to lead a chemically free lifestyle or patient has prior history of returning to illicit drug usage. The examiner had the option of checking all three boxes but neither of the above was chosen. The diagnostic impression at that time was Methadone maintenance rather than the other alternative Chemical Dependency. There was no indication she was taking any drug other than Methadone at her evaluation in July 1996.

It would appear to be contradictory and counterproductive to have one branch of government funding programs to attempt to keep people off drugs and functional by prescribing Methadone, and another maintaining that failing to stop engaging in this activity causes people to be disabled. Respectfully stated, eradicating legitimate drug usage in order to prevent the greater evil of other drug abuse was not the target under P.L. 104-121.

II.

THE ELEVENTH CIRCUIT PANEL DECISION ADOPTING THE ALJ RATIONALE IS AGAINST THE INTENT OF THE CAAA AND THE SOCIAL SECURITY ADMINISTRATION'S REGULATIONS.

The Eleventh Circuit Court specifically concluded that the CAAA was applicable to Ms. Walker's case, rationalizing that "Simply stated, Walker's prescription drug abuse necessitated her methadone treatment, and thus her benefits were denied. Walker's prescription drug abuse was therefore a "contributing factor material" to the determination that she was unable to work".

Thus, as stated in correspondence dated September 28, 2000 from a representative of NOSSCR, the Court misapplied the standard for evaluating disability for an individual who has a drug addiction. The Court appeared to find that the mere fact that she was taking methadone or that she abused prescription drugs forced a finding of non-disability. The correct standard is to first determine whether the individual is disabled, taking into consideration all of her impairments. If the individual is disabled, the next step is to remove those limitations caused by her drug abuse. If the remaining impairments are disabling, the individual is entitled to benefits regardless of her continued drug use.

The Congressional Record reveals an absence of reference to prescription medication or methadone. A medical policy clarification statement dated July 20, 1995 - DAA Materiality decision when claimant is in a methadone treatment program - issued by the Social Security Administration encapsulates the Social Security

Administration's policy that a claim cannot be denied simply on the basis of methadone dependence[5].

It is objectively reasonable to infer from the language of the Public Law that the volunteer behaviors of engaging in excessive drinking and illegal drugs were its targets. In one guide it has been summarized as "elimination of benefits to those using drugs unlawfully" (Glin Guide, United States, Part 13: Public Laws of 104th Congress).

Methadone treatment is specifically mentioned by the Social Security Administration as a recognized and acceptable form of substitution therapy (20 C.F.R. 416.937(c)).

If methadone treatment is a form of treatment it cannot be a form of abuse. Abuse is the cornerstone premise of Public Law 104-121 which was designed to preclude benefits where there would be no disability but for drug abuse. If substitution therapy is not abuse, then the Public Law does NOT apply under those circumstances; and the inquiry as to what potentially disabling conditions remain if drugs and alcohol are removed from consideration under 20 C.F.R. 404.1535 equally does not apply.

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[5] Issued prior to the enactment of P.L. 104-121 when drug or alcohol addiction was acknowledged as disabling.

III.

THE RATIONALE THAT BUT FOR METHADONE USAGE, A CLAIMANT WOULD BE ABUSING DRUGS OR ALCOHOL WHICH WOULD LEAD TO A FINDING OF MATERIALITY AND NON-DISABILITY IS SPECULATIVE AND AGAINST PUBLIC POLICY.

The United States District Court found that the ALJ determined Ms. Walker's drug abuse/dependence material to disability within the meaning of 20 C.F.R. 404.1535, that she was placed on a Methadone maintenance program in order to withdraw from and not return to substance abuse, and that in light of her continued need for Methadone, the ALJ properly found that she still remained with a dependence to the drugs. The logic of the Court's analysis appears to be that if Ms. Walker stopped taking Methadone, she would revert to drugs and alcohol of the type contemplated under the Act, which would in turn render her not disabled if she stopped taking them.

The Eleventh Circuit Court purported not to consider this rationale but in fact, respectfully stated, this rationale underlies the resulting decision.

The Court's argument is flawed, first because the code section cited directs an analysis of a claimant's disability if they were to **stop** drinking or using drugs. All the evidence indicates that Ms. Walker **had** stopped engaging in drug/alcohol abuse long after her husband died, **several years** before this analysis was due. The only "substance" or "drug" she was taking was Methadone, a prescription medication (discussed above). The analysis therefore turns on whether Ms. Walker would be disabled if she stopped taking Methadone. Secondly, even if there were a grain of logic to

the argument of the Court below, the Court exceeds its authority in punitive over speculation. It is not the task of that Court or the ALJ to consider materiality against the drugs she **might** take, rather than the drugs she does take.

IV.

METHADONE MAINTENANCE IS NOT IN ANY EVENT MATERIAL TO THE ANALYSIS OF THE EFFECT OF ALL REMAINING IMPAIRMENTS.

The ALJ found that the Petitioner's drug abuse/dependence imposes moderately severe restrictions upon her ability to respond to customary work pressures, and thus prevents her from engaging in any substantial gainful activity, but that her other impairments do not prevent her from performing light work. First, there is no indication that Ms. Walker was engaging in continued opiate abuse of the type which led to methadone maintenance, or any continued and systematic opiate abuse other than Methadone itself. Medical records in 1995 show only a past history of alcoholism.

According to accepted medical standards, Methadone can produce drug dependence of the morphine type and therefore has the potential for being abused. However, Methadone is a synthetic narcotic analgesic. It is not a tranquilizer. Patients who are maintained on this drug will react to life problems and stresses with the same symptoms of anxiety as do other individuals. The action of methadone in maintenance treatment is limited to the control of narcotic symptoms and is ineffective for relief of general anxiety. (PDR, 46th Ed., 1992) Thus, even if the sustained use of Methadone could be considered drug addiction within the ambit of the statute, Ms. Walker's mental problems, and in particular her marked impairment in ability to respond to work

pressures, would not resolve if she stopped using Methadone, and Ms. Walker would be disabled with or without Methadone use.

Further, Petitioner testified and the medical evidence shows that she had always had problems with nervousness and panic attacks. She had been diagnosed on multiple occasions by many physicians even in the context of a physical examination with depression and anxiety, described as underlying. Notably, the ALJ did not include depression or anxiety as severe impairments, noting that they were "subjective complaints."

CONCLUSION

A judicial finding that methadone addiction in the course of prescribed treatment constitutes drug and alcohol abuse is contrary to the intent of the CAAA and contrary to the Social Security Administration's own rules and regulations. As a matter of public policy, candidates for methadone treatment should not be barred from receiving Social Security or Supplemental Security Income benefits on this basis.

The evidence of record establishes that opiate abuse ceased some time in 1992 at the time of entry into Methadone treatment and that drinking had stopped by the time of Ms. Walker's husband's death in December 1993. There is no evidence of record to establish that Ms. Walker was addicted to any other drug than Methadone. This type of addiction does not fall within the ambit of drug and alcohol excesses targeted for regulation by Congress. Even if Methadone addiction were to be considered drug abuse, according to medically recognized standards, maintenance on Methadone would not resolve or have any effect on Ms. Walker's mental impairments of anxiety and depression.

The evidence of record suggests an onset date of December 18, 1993 consistent with the date of death of Ms. Walker's husband, the date she stopped drinking, and as originally contemplated; or in the alternative June 28, 1997, the date of the ALJ decision, when Ms. Walker was four months away from her 55th birthday, when under a non mechanical application of the Medical Vocational Rules, Ms. Walker was disabled under the ALJ's own rationale.

Petitioner respectfully requests this Court to hold that prescribed Methadone maintenance while resulting in addiction, is not unlawful and does not constitute drug and alcohol abuse of the type contemplated under P.L. 104-121; and to vacate and reverse the decisions below and award the benefits claimed.

Respectfully submitted,

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APPENDIX A-1 – DECISION FROM ADMINISTRATIVE LAW JUDGE ERWIN C. BETTS DATED JUNE 28, 1997

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARING AND APPEALS

June 28, 1997

DECISION

IN THE CASE OF	**CLAIM FOR**
Linda K. Walker (Claimant)	Widow's Insurance Benefits (Disability)
Charles W. Walker (Wage Earner)	(XREF: 421-58-1072) 423-52-2929 (Social Security Number)

PROCEDURAL HISTORY

The claimant, Linda Walker, filed for widow's insurance benefits (disability) under Title II of the Social Security Act on March 8, 1994, with a protective filing date of February 28, 1994. She alleged disability as of January 1, 1988, due to a spastic colon and depression. The claim was denied through the reconsideration determination level, after which the claimant filed a request for hearing before an Administrative Law Judge. A hearing was held in Birmingham, Alabama on November 27, 1995, before the undersigned. The claimant appeared and testified, and was represented by Charles T. Clark, an attorney. Dr. David Head appeared as vocational expert. However, on March 29, 1996, Public Law 104-121, the Contract with America Advancement Act of 1996, revised sections 223 (d) (2) and 1614 (a) (3) of the Social Security Act. Specifically, section 105 of that law provides that beginning March 29, 1996, if drug addiction and/or alcoholism is a contributing factor material to the determination that an individual

is disabled, that individual is not eligible for, or entitled to, disability benefits. This provision applied to claimants who had a hearing before enactment of Public Law 104-121. Ms. Walker was notified on September 17, 1996, that since this provision applied to her, she could request a supplemental hearing. The claimant made a timely request for a supplement hearing, which was held in Birmingham, Alabama on April 2, 1997, before the undersigned. The claimant appeared and testified, and was again represented by Charles T. Clark. The vocational expert at this hearing was Dr. William Crunk. The Administrative Law Judge has carefully considered all the evidence in the record and arguments presented.

LAW AND ISSUES

Section 202 (e) (4) of the Social Security Act requires that for a widow to be found disabled and entitled to Title II benefits, she must be the widow of a person who died fully insured, and must establish that she was under a disability no later than 7 years after the month the wage earner died. Section 223 (d) (1) of the Social Security Act defines "disability" as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted, or can be expected to last, for a continuous period of not less than 12 months. Section 223 (d) (2) (A) of the Social Security Act further provides that an individual shall be found to be under a disability if his or her physical or mental impairment or impairments are of such severity that the individual is unable to perform his previous work or any other kind of substantial gainful activity considering his age, education, and work experience. Pursuant to Section 205 (a) of the Social Security Act [42 U.S.C. 405], the Commissioner of Social Security has full power and authority to make rules and regulations and to establish procedures not inconsistent with the

provisions of the Social Security Act which are necessary or appropriate to carry out such provisions.

The general issue is whether the claimant is entitled to a period of disability and widow's insurance benefits (disability). The specific issues are whether the claimant is under a disability as defined in the Social Security Act and, if so, when such disability began. The undersigned must also decide whether alcoholism or drug addiction is a factor material to the finding.

CONCLUSION

After giving careful consideration to all the evidence, the Administrative Law Judge finds that although the claimant is disabled, her drug abuse is a contributing factor material to the determination that she is under a disability, and is, therefore, ineligible for benefits under Public Law 104-121, the Contract with America Advancement of 1996. This law enacted March 29, 1996, and applicable to individuals who file for benefits, or whose claims are finally adjudicated, on or after March 29, 1996. In accordance with the determination that the claimant has not been under a disability beginning January 1, 1998, and through the date of this decision, since her remaining impairments would not be disabling, and she could perform a significant number of jobs existing in the national economy compatible with her vocational profile and residual functional capacity. Therefore, she is not eligible for disabled widow's benefits by virtue of the application of February 28, 1994.

SUMMARY AND EVALUATION OF THE EVIDENCE

The claimant, Linda Walker, is 54 years old, having been born on November 19, 1942, and has the equivalence of a high school education. She is the unremarried widow of Charles W. Walker,

who died fully insured under the Social Security Act on December 18, 1993. The claimant testified that she is no longer able to work due to poor memory and stress. She said that she also has a hard time holding food down, and sometimes gags herself to get the food back up. The claimant testified that she has had a problem with abuse of prescription drugs and narcotics for about 30 years, but has not taken drugs for about 4 or 5 years, and is currently on the Methadone program under supervision twice weekly. She said that she also drank alcohol heavily up until her husband died in 1993. The claimant expressed that she has always had problems with nervousness and panic attacks, and said that these have gotten worse with age. She stated that she does not have the money for a private psychiatrist.

As for daily activities, the claimant stated that she does her own housework. She said that she likes to draw, but does not have the money to pursue this hobby.

The medical evidence establishes that the claimant has been a long-time patient of Dr. B. E. Blankenship, a psychiatrist, who has treated the claimant for "a long history of maladaptive behavior and anxiety and mood depression in addition to a good bit of emotional immaturity." Dr. Blankenship also noted that the claimant is an alcoholic. On October 5, 1985, the claimant was admitted to the hospital for detoxification of analgesics and alcohol. Over the course of many years, the claimant had been prescribed Tofranil, Valium, Restoril, Darvocet, and Darvon. (Exhibit 31)

The medical evidence also shows that the claimant has a long history of intermittent solid food dysphagia. In September 1991, she was treated for chronic diarrhea and cramping. (Exhibit 16)

A report from the Tri County Treatment Center reveals that the claimant began a drug free program with Methadone treatment in October 1992. (Exhibit 24)

A consultative psychological evaluation was performed on April 20, 1994, completed by Dr. Carmen Vargo-Moncier. The claimant reported a long history of polysubstance abuse and stated that she was currently on Methadone maintenance treatment. Upon examination, Dr. Vargo-Moncier noted that that claimant's concentration and attention span were slightly impaired, and that she possessed poor judgment. (Exhibit 18)

Dr. Robert Walton performed a consultative physical examination on July 20, 1994, at which time the claimant complained of having a spastic colon, chronic stomach pains, diarrhea, headaches, and dizziness. Upon examination, it was noted that the claimant has no problems with strength, grip, or fine movement. Dr. Walton stated that the claimant has a flattened affect, and that she is obviously on Methadone. He opined that her major problems are depression, anxiety, drug dependency, and probable history of esophageal spasm and/or esophageal ring. (Exhibit 20)

Reports from the UAB Substance Abuse and Methadone Clinic show that the claimant began treatment with Methadone on October 22, 1992 at Tri County Clinic, and was now coming on October 18, 1995, to UAB because of expense of treatment at Tri County. It was reported that the claimant's drug abuse included the use of amphetamines and Ritalin, and after stopping the amphetamines she began using pain pills. It was also noted that she had a past history of alcoholism. At the time the claimant began treatment at UAB, the claimant gave no other complaints. (Exhibit 37)

On June 21, 1996, the claimant entered the Community Psychiatry Program at UAB Hospital with bad nerves as her chief complaint. She also described symptoms of depression and anxiety. She was evaluated by Dr. Robert Savage on July 16, 1996. The claimant stated that she was currently on Methadone and Reglan, and takes over-the-counter sleeping pills about four times a day. She also stated that her chief complaints were money and depression. Upon examination, on the Shipley, the claimant earned an estimated WAIS-R Full Scale IQ score of 106, placing her in the average range of intellectual functioning. Dr. Savage diagnosed Opiod, Alcohol, Sedative Induced Mood Disorder, Opiod Dependence (by history), Alcohol Dependence, in sustained full remission (by history), Sedative Dependence, and Dependent Personality Disorder (with avoidant and borderline traits). Dr. Savage stated that no thought disorder was evidenced, and that her depressive mood disorder was most likely substance induced. He recommended no antidepressant medication, that she continue her treatment in the drug free program, and should also participate in AA/NA. (Exhibit 38)

On August 7, 1996, the claimant was seen at the psychiatry clinic, very upset over the status of her disability application in that "she has not gotten a check," believing that about two years of checks will be forthcoming. On September 23, 1996, was upset in learning that she had been denied Social Security. She was encouraged to get treatment for her nerves through family and child services for supportive therapy. On September 24, 1996, services through the UAB Community Psychiatry Program were terminated. (Exhibit 38)

On April 15, 1996, the claimant was seen by Dr. Miles Gresham for evaluation of dysphagia, stating that she was having a reoccurrence of past symptoms. The claimant underwent a panendoscopic procedure which revealed a gastric ulcer and a

distal esophageal ulcer. She was prescribed Prilosec and Reglan, and by June 11, 1996, the endoscope revealed healing of esophageal and gastric ulcers. However, by October 11, 1996, Dr. Gresham again ordered an endoscopic procedure which revealed a distal esophageal stricture with pseudodiverticulum, status post dilation. (Exhibit 40)

On November 15, 1996, the claimant was still complaining of dysphagia and feelings of having a bubble of air in her chest all the time. She informed Dr. Leitner, the treating physician, that she had a history of ulcers, a spastic colon, and depression that was no longer being treated. She also stated that she was currently on Methadone treatment. An upper GI series revealed diverticular outpouchings and some reflux, but no definite stricture. The claimant was diagnosed with chronic esophagitis with thickening of squamous mucosa and parakeratosis. On a follow-up visit in February 1997, the claimant stated that she remained the same, not worse. Dr. Leitner recommended that she continue her current medications of Reglan, Axid, Adalat, as well as the Methadone, and return in 3 months. (Exhibits 36 and 40)

A consultative psychiatric evaluation was completed by Dr. Edward Shehi on April 7, 1997. The claimant informed Dr. Shehi that she had a long history of substance abuse, and admitted that she had used Vicodan, Codeine, Valium, Percodan, Demerol, and Benzidiazepines. She stated that she was currently in Methadone treatment and counseling. She denied use of alcohol or the use of illegal or illicit drugs at the present time. The claimant described a typical day as one where she does her own housework and laundry, as well as her mother's laundry. She cooks and drives occasionally, and does her own shopping. She said that she listens to music and watches television about 2 to 3 hours of television daily. The claimant further said that she has a visitor in her home twice per month, and attends church one to two times monthly.

On examination, Dr. Shehi reported that the claimant exhibited anxiety and depression, but would have no difficulty making acceptable work decisions. He diagnosed Major Depression, Recurrent with Generalized Anxiety Features, and Polysubstance Abuse. Dr. Shehi completed a questionnaire regarding the claimant's residual functional capacity where he showed that the claimant would have "marked" restrictions and limitations in her ability to function on a sustained basis in a routine work setting or elsewhere. (Exhibit 40)

In determining whether the claimant is under a "disability," as that term is defined by the Social Security Act, the Commissioner's sequential evaluation of "disability" as set forth at Social Security Regulations 20 CFR 404.1520 had been applied. The first step of that evaluation process requires a consideration of work activity. The evidence of record is that the claimant has not engaged in substantial gainful activity since her alleged onset date of January 1, 1988.

The second step of the sequential evaluation requires an assessment of the medical evidence of record, which must establish a "severe" impairment, or combination of impairments. Social Security Regulations 20 CFR 404.1520 (c) define a "severe" impairment, or combination of impairments as one that significantly limits the ability to perform basic work related activities. After carefully considering all of the evidence, the undersigned finds that the claimant has the following medically determinable impairments: dysphagia, hypertension, substance abuse/dependence in that she is currently in Methadone treatment, dependent personality, and substance induced mood disorder.

The third step of the sequential evaluation requires a consideration of the impairments of Appendix 1 to Subpart P of Social Security Regulations No. 4. The claimant is under a "disability" if there is

an impairment, or combination of impairments, of sufficient severity to meet or equal the criteria of at least one of the impairments found in Appendix 1. The claimant has no impairment, other than her drug abuse/dependence, which meets the criteria of any of the listed impairments. When all of the claimant's impairments are considered together, her drug abuse/dependence prevents her from working. The undersigned finds, however, that the claimant's abuse/dependence in that she is currently in Methadone treatment (Exhibit 38) is material to the determination of his disability within the meaning of Public Law 104-121, as her impairments, other than her drug abuse/dependence, when considered in combination, do not prevent her from performing work. No treating physician has mentioned findings equivalent in severity to the criteria of any listed impairment. In reaching this conclusion, the Administrative Law Judge has considered the opinions of the State agency medical consultants who evaluated this issue at the initial and reconsideration levels of the administrative review process and reached the same conclusion. (20 CFR 404.1527 (f) and SSR 96-6p).

The Administrative Law Judge must next consider the claimant's residual functional capacity, a term which describes the range of work activities the claimant can perform despite her impairments. In assessing the claimant's residual functional capacity, consideration must be given to subjective allegations. The undersigned has reviewed the claimant's subjective complaints in accordance with the guidelines provided by Social Security Regulations 20 CFR 404.1529 (c) and SSR 96-7p. The undersigned has also taken into consideration the controlling case law in the Eleventh Circuit regarding the standard used to assess subjective complaints of pain and other subjective symptoms. This standard requires "(1) evidence of an underlying medical condition and either (2) objective medical evidence that confirms

the severity of the alleged pain arising from that condition or (3) that the objectively determined medical condition is of such severity that it can reasonably be expected to give rise to the alleged pain." Brown v. Sullivan, 921 F.2d 1233 (11th Cir. 1991). This standard also applied to subjective symptoms other than pain. Holt v. Sullivan, 921 F.2d 1221 (11th Cir. 1991).

Although the claimant has subjective complaints, including depression and anxiety, the medical record, when considered in its entirety, does not support that the claimant has a mental impairment that could reasonably be expected to produce symptoms above the mild to moderate level. The evidence also clearly indicates that the claimant has no physical impairment which would prevent her from performing work activities. Thus, her main problem is drug abuse/dependence. The claimant's statements concerning her impairments, and their impact on her ability to work, are not entirely credible in light of discrepancies between the claimant" assertions and information contained in the documentary reports, the medical history, and the findings upon examination. While her depression appears to be situational, in that it is most likely related to substance abuse as stated by Dr. Savage, she is not currently receiving or seeking mental treatment. Therefore, based on the objective findings set forth in the medical record, the undersigned concludes that if the claimant were not drug dependent, her remaining impairments would not be disabling, and she retains the residual functional capacity for the exertional requirements of light work with only moderate limitations in relating to co-workers and supervisors, and in understanding, remembering, and carrying out instructions, while sustaining persistence and concentration in a work setting.

At step four of the sequential evaluation, it is necessary to determine whether the claimant possesses the functional abilities to perform her past relevant work. Since the claimant has not

worked in 28 years, she has no past relevant work. When one is unable to return to past relevant work, the burden of proof shifts to the Commissioner to show that there are other jobs existing in significant numbers to which the claimant is able to make a successful vocational adjustment considering age, education, work experience and residual functional capacity. Such a determination must be made in light of Medical-Vocational Guidelines of Appendix 2 of the regulations (20 CFR, Subpart P, Regulations No. 4).

The claimant is presently 54 years old, an individual "closely approaching advance age," and has the equivalence on a high school education. Dr. Crunk, the vocational expert, responded to a hypothetical question which incorporated the claimant's age, educational-vocational background, medically determinable impairments, and residual functional capacity. He was also asked to assume that the individual was moderately impaired in relating to co-workers and supervisors, and in understanding, remembering, and carrying out instructions, while sustaining persistence and concentration in a work setting. Dr. Crunk testified that there would be a significant number of jobs that such an individual could perform, consistent with the hypothetical profile. Examples of such jobs would include laundry service jobs and cleaning service (office) jobs, and there would be approximately 2,000 of these available regionally. There would also be jobs in central supply areas of hospitals and benchwork jobs numbering about 1,200 in the region. Based on the testimony of the vocational expert, and considering the claimant's impairments within the framework of Rule 201.13 of the Medical-Vocational Guidelines, the claimant cannot be found disabled.

Accordingly, in applying the sequential steps outlined above, the Administrative Law Judge concludes that the claimant is "not disabled" within the meaning of the Social Security Act, and not

eligible for benefits since her drug abuse/dependence is a contributing factor material to the determination of disability. Therefore, in accordance with Section 105 of Public Law 104-121, the claimant is ineligible supplemental security income payments based on this application.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant is the unremarried widow of the wage earner, who died fully insured on December 18, 1993.

2. The claimant has not engaged in substantial gainful activity since January 1, 1988.

3. The claimant has the medically determinable impairments of dysphagia, hypertension, substance abuse/dependence, dependant personality, and substance induced mood disorder.

4. The claimant's impairments, when considered in combination, neither meet nor are medically equivalent to any impairment listed in Appendix 1 to Subpart P, 20 CFR 404.

5. The claimant's drug abuse/dependence imposes moderately severe restrictions upon her ability to respond to customary work pressures, and, thus, prevents her from engaging in any substantial gainful activity.

6. The claimant cannot return to past relevant work.

7. The claimant's impairments, other than her drug abuse/dependence, when considered in combination, limit her, but do not prevent her from performing work at the light exertional levels. To the extent that the claimant claimed to be more severely impaired than this by her impairments other than her drug abuse/dependence, her testimony was inconsistent with and less credible than the medical evidence of record.

8. The claimant's impairments, other than her drug abuse/dependence, when considered in combination, do not prevent her from performing jobs at the light exertional level, and experience depression and anxiety, lack of concentration, or deterioration in a work setting above the moderate level.

9. The claimant, except for her drug abuse/dependence, has not been "disabled" at any time through the date of this decision under 20 CFR Section 404.1520 (e). The claimant's drug abuse/dependence is, therefore, material to the determination of her disability, within the meaning of 20 CFR Section 404.1535, and the claimant is ineligible for benefits under Public Law 104-121.

DECISION

It is the decision of the Administrative Law Judge that, based on the application protectively filed on February 28, 1994, the claimant is disabled under Section 202 (e) and 223, respectively of the Social Security Act, as amended, but would not be disabled if she stopped engaging in drug abuse. Therefore, the claimant is ineligible for disabled widow's benefits based on disability under Public 104-121.

Date: June 28, 1997

Erwin C. Betts
Administrative Law Judge
Suite 407, 117 Gemini Circle
Birmingham, AL 35209-5861

OHA PSYCHIATRIC REVIEW TECHNIQUE FORM

NAME: Linda Walker SSN: 423-52-2929

Assessment is for: Current Evaluation

Administrative Law Judge's Signature Date

I. MEDICAL SUMMARY

A. Medical Disposition(s): RFC Assessment Necessary (i.e., a severe impairment is present which does not meet or equal a listed impairment)

B. Based Upon Category(ies): 12.04

II. Reviewer's Notes (Does not apply to OHA)

III. DOCUMENTATION OF FACTORS THAT EVIDENCE THE DISORDER (Evaluation of the existence of a sign or symptom CLUSTER or SYNDROME for the Listed Disorder.)

PRESENT	ABSENT			
[ ]	[X]	A.	12.02	Organic Mental Disorders
[ ]	[X]	B.	12.03	Schizophrenic, Paranoid and other Psychotic Disorders
[X]	[ ]	C.	12.04	Affective Disorders
[ ]	[X]	D.	12.05	Mental Retardation and Autism
[ ]	[X]	E.	12.06	Anxiety Related Disorders
[ ]	[X]	F.	12.07	Somatoform Disorders
[ ]	[X]	G.	12.08	Personality Disorders
[ ]	[X]	H.	12.09	Substance Addiction Disorder

OHA PSYCHIATRIC REVIEW TECHNIQUE FORM

NAME: Linda Walker SSN: 423-52-2929

Assessment is for: Current Evaluation

Administrative Law Judge's Signature Date

I. MEDICAL SUMMARY

A. Medical Disposition(s): RFC Assessment Necessary (i.e., a severe impairment is present which does not meet or equal a listed impairment)

B. Based Upon Category(ies): 12.04, 12.09

II. Reviewer's Notes (Does not apply to OHA)

III. DOCUMENTATION OF FACTORS THAT EVIDENCE THE DISORDER (Evaluation of the existence of a sign or symptom CLUSTER or SYNDROME for the Listed Disorder.)

PRESENT	ABSENT			
[ ]	[X]	A.	12.02	Organic Mental Disorders
[ ]	[X]	B.	12.03	Schizophrenic, Paranoid and other Psychotic Disorders
[X]	[ ]	C.	12.04	Affective Disorders
[ ]	[X]	D.	12.05	Mental Retardation and Autism
[ ]	[X]	E.	12.06	Anxiety Related Disorders
[ ]	[X]	F.	12.07	Somatoform Disorders
[ ]	[X]	G.	12.08	Personality Disorders
[X]	[ ]	H.	12.09	Substance Addiction Disorder

C. **12.04 Affective Disorders** – Disturbance of mood, accompanied by a full or partial manic or depressive syndrome, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1. [ ] [X] [ ] Depressive syndrome characterized by at least four of the following:
   - a. [ ] Anhedonia or pervasive loss of interest in almost all activities, or
   - b. [ ] Appetite disturbance with change in weight, or
   - c. [ ] Sleep disturbance, or
   - d. [ ] Psychomotor agitation or retardation, or
   - e. [ ] Decreased energy, or
   - f. [ ] Feelings of guilt or worthlessness, or
   - g. [ ] Difficulty concentrating or thinking, or
   - h. [ ] Thoughts of suicide, or
   - i. [ ] Hallucinations, delusions or paranoid thinking

2. [ ] [X] [ ] Manic syndrome characterized by at least three of the following:
   - a. [ ] Hyperactivity, or
   - b. [ ] Pressures of speech, or

c. [ ] Flight of ideas, or
d. [ ] Inflated self-esteem, or
e. [ ] Decreased need for sleep, or
f. [ ] Easy distractibility, or
g. [ ] Involvement in activities that have a high probability of painful consequences which are not recognized, or
h. [ ] Hallucinations, delusions or paranoid thinking

3.	[ ]	[X]	[ ]	Bipolar syndrome with a history of episodic periods manifested by the full symptomatic picture of both manic and depressive syndromes (and currently characterized by either or both syndromes)
4.	[X]	[ ]	[ ]	Other Dependent personality and substance induced depressive mood disorder

H. **12.09 Substance Addiction Disorders** – Behavioral changes or physical changes associated with the regular use of substances that affect the central nervous system.

If present, evaluate under one or more of the most closely applicable listings:

1.	[ ]	Listing 12.02 - Organic mental disorders*
2.	[ ]	Listing 12.04 - Affective disorders*
3.	[ ]	Listing 12.06 - Anxiety disorders*
4.	[ ]	Listing 12.08 - Personality disorders*
5.	[ ]	Listing 11.14 - Peripheral neuropathies*
6.	[ ]	Listing 5.05 - Liver damage*
7.	[ ]	Listing 5.04 - Gastritis*
8.	[ ]	Listing 5.08 - Pancreatitis*
9.	[ ]	Listing 11.02 or 11.03 – Seizures*
10.	[X]	Other: Drug abuse and dependence

*NOTE: Items 1, 2, 3, 4, 5, 6, 7, 8, and 9 correspond to Listings 12.09A, 12.09B, 12.09C, 12.09D, 12.09E, 12.09F, 12.09G, 12.09H, and 12.09I, respectively. If items 1, 2, 3, or 4 are checked, only the numbered items in subsections IIIA, IIIC, IIIE, or IIIG of the form need be checked. The first two blocks under the disorder heading in those subsections need not be checked.

IV. RATING OF IMPAIRMENT SEVERITY

A. "B" CRITERIA OF THE LISTINGS

THE FOLLOWING FUNCTIONAL LIMITATIONS (WHICH APPLY TO PARAGRAPH B OF LISTINGS 12.02-12.04 AND 12.06-12.08 AND PARAGRAPH D OF 12.05 EXIST AS A RESULT OF THE INDIVIDUAL'S MENTAL DISORDER (S).

NOTE: ITEMS 3 AND 4 BELOW ARE MORE THAN MEASURES OF FREQUENCY. DURATION AND EFFECTS OF THE DEFICIENCIES (ITEM 3) OR EPISODES (ITEM 4) ARE DISCUSSED IN THE DECISION.

Listing (s) under which the items below are being rated: 12.04, 12.09

FUNCTIONAL LIMITATION AND DEGREE OF LIMITATION

1. Restrictions of Activities of Daily Living:

None [ ] Slight [ ] Moderate [X] Marked* [ ] Extreme [ ] Insuff Evid [ ]

2. Difficulties in Maintaining Social Functioning:

None [ ] Slight [ ] Moderate [X] Marked* [ ] Extreme [ ] Insuff Evid [ ]

3. Deficiencies of Concentration, Persistence or Pace Resulting in Failure to Complete Tasks in a Timely Manner (in work settings or elsewhere):

Never [ ] Seldom [ ] Often [ ] Frequent* [X] Constant [ ] Insuff Evid [ ]

4. Episodes of Deterioration or Decompensation in Work or Work-Like Settings Which Cause the Individual to Withdraw from that Situation or to Experience Exacerbation of Signs and Symptoms (which may Include Deterioration of Adaptive Behaviors):

Never [X] Once/Twice [ ] Repeated* [3+] Continual [ ] Insuff Evid [ ]

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*Degree of limitation that satisfies the Listings: Extreme, Constant and Continual also satisfy that requirement.

B. Summary of Functional Limitation Rating for "B" Criteria

NO. OF FUNCTIONAL LIMITATIONS MANIFESTED AT THELISTING LEVEL: [1] (The number must be at least 2 to satisfy the requirements of paragraph B in Listings 12.02, 12.03, 12.04 and 12.06 and paragraph D in 12.05; and at least 3 to satisfy the requirements in paragraph B in Listings 12.07 and 12.08)

APPENDIX A-2 – DECISION FROM THE APPEALS COUNCIL BY APPEALS OFFICER MARK K. HAYDU DATED JANUARY 19, 1999

Refer to: TAHBL
421-58-1072

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Ms. Linda K. Walker
2300 5th Ave., North
Apt. 216
Birmingham, AL 35203

Dear Ms. Walker:

The Appeals Council has considered the request for review of the Administrative Law Judge's decision issued on June 24, 1997.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law: (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrate Law Judge's actions, findings, or conclusion is contrary to the weight of the evidence currently of record (20 CFR 404.970).

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for

review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Commissioner of Social Security in your ase. In reaching this conclusion, the Appeals Council has considered the applicable statutes, regulations, and rulings in effect as of the date of this action.

The Appeals Council has also considered the contentions raised in the material identified on the attached Order of Appeals Council, but concluded that these contentions do not provide a basis for changing the Administrative Law Judge's decision.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside with sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Commissioner of Social Security as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)).

If you cannot file your complaint within 60 days, you may ask the Appeals Council to extend the time in which you may begin a civil action. However, the Council will only extend the time if you provide a good reason for not meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Commissioner must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel, Social Security Administration, Room 611, Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235. (See rules 4(c) and (i) of the Federal Rules of Civil Procedure). In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

original signed by
Mark K. Haydu
Appeals Officer

cc:
Darryl W. Hunt
Charles T. Clark

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

ORDER OF APPEALS COUNCIL

In the case of	**Claim for**
	Period of Disability
	Disability Insurance Benefits
Linda K. Walker	Widow's Insurance Benefits (Disability)

	421-58-1072
(Wage Earner)	(Social Security Number)

(Leave blank if same as above)

Evidence in addition to that which was before the Administrative Law Judge has been received by the Appeals Council and is hereby made a part of the record. That evidence consists of the following exhibit(s):

Exhibit AC-1 Letter from counsel, dated August 8, 1997

Exhibit AC-2 OHA response notice, dated February 17, 1998

Exhibit AC-3 Brief from counsel, date April 3, 1998

Date: Jan 19, 1999

APPENDIX A-3 – MEMORANDUM OPINION AND ORDER FROM THE UNITED STATES FEDERAL DISTRICT COURT BY INGE P. JOHNSON ENTERED NOVEMBER 4, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LINDA WALKER,

Plaintiff,

ENTERED
NOV 4 1999

vs. **Civil Action No. CV-99-J-0677-S**

KENNETH APFEL, COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION,

Defendant.

MEMORANDUM OPINION

This matter is before the court on the record and briefs of the parties. This court has jurisdiction pursuant to 42 U.S.C. § 405.

Procedural Background

The plaintiff filed application for disabled widow's insurance benefits (DWIB) and Supplemental Security Income (SSI) on March 8, 1994 (R. 79-81, 89-91) in which she alleged that her disability began January 1998 due to spastic colon and depression (R. 80, 89, 123). The applications were denied (R. 82-84, 92-93). The plaintiff filed a request for reconsideration (R. 85) which was also denied (R. 87-88, 94-99). Plaintiff timely requested a hearing before an Administrative Law Judge ("ALJ") (R. 32-34). A hearing was held in front of an ALJ on November 27, 1995 (R. 37-58). Before the ALJ had issued a decision, a "Notice to Claimants who had a Hearing

before Enactment of Public Law 104-121" was sent to plaintiff on September 17, 1996 (R. 29-30).[1] A supplemental hearing was held before the ALJ on April 2, 1997 (R. 59-78). After the hearings the ALJ entered an opinion finding that the plaintiff was disabled under Sections 202(e) and 223 of the Social Security Act, respectively, but would not be disabled id she stopped engaging in drug abuse (R. 22). Therefore the ALJ found the plaintiff ineligible for disabled widow's benefits based on disability under Public Law 104-121.[2]

The plaintiff requested administrative review of the ALJ's decision by the Appeals Council (R. 8-9). Plaintiff submitted a brief to the Appeals Council (R. 365-369). The Appeals Council denied plaintiff's request for review January 19, 1999 (R. 5-6). The ALJ's decision thus became the final order of the Commissioner of Social Security. See 42 U.S.C. §405(g). This action for judicial review of the agency followed on March 22, 1999 (doc. 1). The plaintiff argues that the final decision of the ALJ failed to properly apply the correct legal standards and that the decision of the ALJ and that of the Appeals Council are not supported by substantial evidence (doc. 1).

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[1] Public Law 104-121 provides that if drug addiction and/or alcoholism is a contributing factor material to the determination that an individual is disabled, that individual is not eligible for, or entitled to, disability benefits. *See also* 20 C.F.R. §404.1535 and 20 C.F.R. §416.935.

[2] *See* 42 U.S.C. §423(d)(2)(C).

The Court has considered the record and the briefs of the parties and for the reasons set forth herein, the decision of the Commissioner is **AFFIRMED.**

Factual Background

The plaintiff was born November 19, 1942 (R. 42). She completed 10th grade in school, but obtained her GED (R. 43). She has not worked for 28 years prior to the second hearing (R. 64). She was married to Wayne Walker who died December 18, 1993. Mr. Walker owned a floor sanding business and died fully insured (R. 43). The plaintiff claims that she is unable to work due to a spastic colon, difficulty eating or keeping food down, stress, bad nerves, and problems concentrating and with her memory (R. 45-48, 53, 65, 66, 70). When asked by her attorney if she would be able to handle a regular job, which required her to answer to supervisors and work with fellow employees, and which also required her to produce things and answer questions on a regular basis, the plaintiff answered: "I, I don't think so, because I've always been, like I say, I've always been this way and everything. It seems like, maybe, my age or something is, is, is, you know, as years to come on, it, it, it gets worse, and, and I just don't feel like I'd be able to carry it down. I might last a week or so, but.... [B]ut I think I'd probably get nervous a time or two, or something and then do something, and they just wouldn't, just couldn't, couldn't use somebody like that, you know" (R. 71).

The plaintiff testified that she has abused prescription drugs and alcohol for 30 years prior to 1992 (R. 74). Since 1992 she has been on a Methadone maintenance program (R. 73). Plaintiff testified that she has been off drugs and alcohol since then. Plaintiff likes to

draw as a hobby, but does not have the materials to pursue that hobby (R. 73-74). She testified that she does her own housework (R. 73).

The medical evidence establishes that plaintiff has been a patient of Dr. B. E. Blankenship, a psychiatrist, since 1996 (R. 252). At that time, Dr. Blankenship was in psychiatric residency at University Hospital, and plaintiff was admitted for "overdose of medication while acutely intoxicated with alcohol" (R. 252).[3] Dr. Blankenship's records reflect that plaintiff would seek prescription medications in order to cope with the stress in her life. The records further reflect that medications such as Darvocet and Ritalin were liberally dispensed to plaintiff by Dr.

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[3] This information is contained in an evaluation performance by Dr. Blankenship on July 7, 1970. The same evaluation further notes: "Today the patient tells me that she is "drinking too much" and denies taking pills at the present time.... Patient recalls being hospitalized at Bryce in 1964.... Patient was hospitalized in 1968 for an overdose of medication...in an apparent similar episode to the one in which I manage her in 1966.... The patient's mother has been under treatment...and was hospitalized...for dependence and/or addiction to medication. Her father is a former alcoholic" (R. 252-253). The medical records of Dr. Blankenship which were considered by the ALJ, reflect that plaintiff has suffered from emotional problems and stress due to various factors such as failed or rocky marriages, a husband who gambled, loss of custody of her two oldest sons, a child who is HIV positive, a dysfunctional relationship with her mother and her husband's brother, financial problems such as utilities being terminated for lack of payment, automobile accidents, teeth problems, and cats dying" (R. 180-264).

Blankenship (R. 180-264). There are several notations in the medical records that plaintiff would "loose" her prescription for Darvon, Darvocet, Restoril and Valium, and an "ok" was given to the pharmacy to fill the prescription anew (R. 198, 199, 206, 207, 220, 227, 230, 232, 236).[4]

The medical records of Miles E. Gresham, M.D., also reflect that plaintiff suffers from food dysphagia, diarrhea and cramping (R. 147-148).

Plaintiff began a drug free program with Methadone treatment at Tri County Methadone Clinic in October of 1992 (R. 304). She transferred to The University of Alabama in Birmingham Substance Abuse and Methadone Clinic in October of 1995 (R. 292-319).

Dr. Carmen Vargo-Moncier, Licensed Psychologist, performed a consultative examination of plaintiff on April 20, 1994 (R. 154-156). Plaintiff reported to Dr. Vargo-Moncier that she had been a patient of Dr. Blankenship since her early twenties, that she would usually see him once a month, and that she had been a patient in Brookwood Hospital for psychiatric problems "bunches of times" (R. 154).

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[4] The Court notes that plaintiff was given innumerable prescriptions for Darvon and Darvocet during the period of time she was under Dr. Blankenship's care (R. 180-208). These medications are prescribed for relief of mild to moderate pain, *Physicians Desk Reference*, 1999 Edition at 1567-1574. However, only in very few instances do the records reflect that plaintiff suffered from any pain (R. 180-208).

She also reported alcohol dependence and polysubstance abuse, but claimed that had ceased since she began her Methadone treatment program (R. 154). When describing her daily activities to Dr. Vargo-Moncier, plaintiff reported that she gets up at seven-thirty or eight o' clock every morning and tends to her own hygiene and grooming. She attends Methadone Clinic three times a week. She performs her own household chores and may also help her mother do her house cleaning. Plaintiff visits family, watches TV, and reads newspapers, books and magazines. She goes to bed between five and eight-thirty p.m. and reported erratic sleep patterns. In the mental status examination, Dr. Vargo-Moncier noted that plaintiff appeared on time for the appointment well-groomed. She did not suffer from hallucinations, delusions or obsessions, and other than not liking to be strapped in a seat belt, she also did not suffer from ant phobias and compulsions. Dr. Vargo-Moncier noted that plaintiff's speech was rapid and over productive. Plaintiff's affect was described as broad with somewhat labile features, fluctuating from sad to laughing, but content related. Her mood was described as anxious, but she denied current suicidal ideation or intent. Plaintiff was noted as having minimal insight into her present condition (R. 155). Although plaintiff's concentration showed slight impairment, her ability to make and understand abstractions showed that it was intact. Her fund of general knowledge was found to be good, although her attention span was somewhat impaired. Plaintiff's intellectual functioning was estimated to be in the borderline to average range. Plaintiff was noted as possessing poor judgment (R. 156).

A consultative examination was performed by Dr. Robert Walton, M.D., on plaintiff July 20, 1994 (R. 159-160). At that time plaintiff complained of spastic colon,

chronic stomach pains and diarrhea, as well as nausea. Dr. Walton noted that plaintiff has a flattened affect (R. 159). He also noted that a major component is depression, anxiety, drug dependency, probable history of esophageal spasm and/or esophageal ring (R. 160). Dr. Walton noted that plaintiff is in Methadone treatment. He also noted that she had no problems with grip or strength or fine movement of holding a cup or glass or dressing herself and utilizing buttons (R. 159).

Plaintiff was treated at the University of Alabama in Birmingham Substance Abuse and Methadone Clinic ("UAB") from October 18, 1995 until March 31, 1997. These records reflect that plaintiff was treated at Tri County Methadone Clinic from October 22, 1992 until October 18, 1995, and that she transferred to UAB for financial reasons (R. 304). The mental status examination performed by Norman Higgins, M.D., on said date indicated that plaintiff's speech was spontaneous with a round rate, her thinking was goal directed and her cognitive functions were intact. Her judgments were reality based and realistic for present and future goals. She denied current suicidal, homicidal or hallucinatory experiences (R. 305). Plaintiff indicated to UAB that she had taken Valium, Ritalin, pain killers, anti-depressants and "many more" medications in the past (R. 314). She also stated that she suffered from a spastic colon, esophageal rupture, psoriasis, nerves and hypertension (R. 307).

On June 21, 1996, the plaintiff entered UAB Community Psychiatric Program with her chief complaint being "nerves so bad" and as recent stressors she listed "recently moved", $ (R. 334). Her mental status examination at that time revealed that she was of clean appearance, her demeanor was cooperative and engagable,

her speech was of normal rate, rhythm and latency, she was slightly agitated, her mood was euthymic, her affect full range, congruent to content. Her thought process was goal directed and she was without suicidal or homicidal ideation, intent or plan, and without delusions, obsessions and disturbance of thought (R. 337). Dr. Robert Savage, Clinical Psychologist, reported his evaluation of plaintiff on August 1, 1996 (R. 328-332). He reported plaintiff's current medications as Methadone and Reglan. She also reported to him that she had been taking over-the counter sleeping pills four times per day (R. 328). Her chief complaint was "money and this depression came up." Plaintiff attributed her financial problems to unemployment and lack of "SSI" benefits (R. 328). She reported that she had been approved for and used Methadone since 1992. Regarding her "depression," plaintiff reported that she took a sleeping pill which decreased her depression. She stated that the symptoms of her depression including having "no joy," feeling empty and unhappy, "feeling like a pain" and having trouble concentrating (R. 328-329). The plaintiff denied experiencing manic symptoms, but did complain of nervousness, worry, racing heart, butterflies, and feeling like "I'm in a hurry" lasting for about five minutes. She reported that she has "shaky spells" and being weak kneed which occurred every six weeks. She finally reported some memory problems such as losing her keys, "having to write things down" and getting lost while driving (R. 329).

Dr. Savage administered the following tests: the Shipley Institute of Living Scale, subtests of the WMS-R, MMPI-2, and MCMI-II. On the Shipley test, plaintiff earned an estimated WAIS-R Full Scale IQ Score of 106. Dr. Savage described that as a score solidly within the average range of intellectual functioning. Plaintiff scored in the 70th percentile for vocabulary skills and at the 88th

percentile for abstract reasoning abilities. The results of the WSM-R testing were consistent with her IQ score of 106 except for the visual memory score which was significantly lower. Dr. Savage opined that plaintiff's overall memory functioning was suggestive of mild alcohol related impairment (R. 330).

Plaintiff appeared to respond to questions on the MMPI-2 in an honest and straightforward manner. The results indicated that she was feeling sad, that she had problems with concentration, memory and attention. It indicated decreased physical activity, low energy, somatic complaints, and feelings of being nervous and worried. Dr. Savage stated that plaintiff felt socially inadequate and tended to avoid social involvement. He opined that plaintiff has learned to tolerate a great deal of unhappiness, and has limited insight into the causes of her difficulties (R. 330).

On the MCMI-II, plaintiff appeared dependent, self-defeating, depressed, anxious, and moody in nature (R. 331). With respect to plaintiff's psychological problems, Dr. Savage diagnosed Opiod, Alcohol, Sedative Induced Mood Disorder; Opiod Dependence (by history); Alcohol Dependence, in sustained full remission (by history); Sedative Dependence; Dependent Personality Disorder (with avoidant and borderline traits); Seizure disorder, esophageal ulcer, and financial problems, widowed and divorced, living alone, unemployed (R. 331).

Dr. Savage concluded with the following summary and recommendations: "Currently, a thought disorder is not evidenced. However, a depressive mood disorder, most likely substance induced, is apparent on psychological testing." [Plaintiff] was diagnosed with Dependant

Personality Disorder, with avoidant and borderline features (R. 331). Dr. Savage did not recommend antidepressants medication unless plaintiff's depressive symptoms worsened. He recommended plaintiff participating in AA/NA, that she continue treatment at UAB Methadone Clinic and that she increase drug-free pleasurable activities (R. 332).[5]

The records from UAB psychiatric clinic of August 7, 1996 reflect that plaintiff complained of being depressed. The records further reflect, that upon further delving, she is "mostly anxious and upset because her disability check is hung up in the system – she agrees with this." Dr. Feldman stated "I continue to feel she doesn't have bad depression.... Have asked Jim Ledbetter to spend time today helping her negotiate system re: her disability check" (R. 325). Jim Ledbetter's notes from the same day reflect as follows: "Patient seen this afternoon per request of Dr. Feldman. Patient clean, casually dressed, fidgety and restless talking about how her attorney's will give her no definite word on the status of her SSDI, SSI appeal. She is upset that she has not gotten a check. Offered patient support and encouraged her to maintain contact with the attorney and to follow up with her care with Dr. Huggins and for her physical problems at Cooper Green. She realizes her getting disability on the basis of her past and present Methadone use will be chancey but she has been

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[5] Dr. Savage also recommended a neurological evaluation due to plaintiff's history of head injury, reported seizures and possible CVA (R. 332). The court notes that plaintiff did not list these possible infirmities as causes for her alleged disability nor did she testify to these at the hearing before the ALJ.

led to believe about two years of checks will be available for her" (R. 324).

Dr. Feldman's notes of June 21, 1996 reflect that plaintiff wants help getting disability, but that his impression is that she is not disabled (R. 338).

The records from Cooper Green Hospital reflect that plaintiff was diagnosed with chronic esophagitis, diverticular outpouchings and some reflux in November/December of 1996 (R. 278, 280, 352-353). On follow up visit in February 1997 plaintiff stated that her condition had remained the same, not worse. It was noted that she was regurgitating food and gaining weight. She was continued on Reglan, Axid and Adalat (R. 352).[6] On March 26, 1997, Dr. Carmichael noted in the record "54 year old white female patient at Methadone Clinic looking for help with getting psychiatric disability. Patient of Dr. Blankenship x 30 years. Patient does have diagnosis of depression. Patient could benefit from a prescription for depression – encouraged to discuss with M. Hutgins at Methadone Clinic" (R. 349).

However, at the second hearing before the ALJ on April 2, 1997, plaintiff testified "as long as I'm on methadone, I'm doing good" (R. 69). Upon being asked what other kind of problems she has which would keep her from working, she testified: "Well, just, I have the same problem I've had all my life, like panicking and not being able to remember, and, and stuff like that" (R. 70). She never testified that she was depressed.

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[6] These medications are for gastroesophageal reflux, ulcers, esophagitis, and hypertension. *See Physicians Desk Reference*, 1999 Edition, p. 2643, 1565 and 637.

A consultative examination was performed by Dr. Edward Shehi on April 7, 1997 (R. 342-347). Plaintiff arrived on time for the interview, was adequately attired, but her hygiene was noted to be disheveled. Her speech was accelerated and loud, but no loose associations or confusion were noted. She was extremely anxious with tremors in hands, extremities and throughout her entire body. Her mood was depressed. She described that she had a low energy level, and was nervous and anxious around others, especially those she did not know. She reported being forgetful and reported thoughts of self-harm. However, Dr. Shehi noted no hallucinations, delusions, ideas of reference, phobias, obsessions, or compulsions (R. 344). When describing her daily activities to Dr. Shehi, plaintiff stated that she does her own housework and her own laundry, as well as her mother's. She cooks one meal per day. She occasionally drives. She does her own shopping. She listens to music and stated that her television is on all the time although she only watches it two to two and one-half hours a day. She has a visitor in her home twice a month. The only visiting she does is to the Methadone Clinic, but she does attend church once or twice per month. She has no real hobbies, and goes to bed between seven and seven-thirty at night. She sleeps four to four and one-half per night and naps three to four times per week for a period of one hour. Dr. Shehi noted that plaintiff displayed fair insight regarding her condition, that she would have no difficulty making acceptable work decisions and would be able to manage financial affairs if awarded monetarily. He diagnosed plaintiff with Major Depression, Recurrent with Generalized Anxiety Features and Polysubstance Abuse (R. 345).

Dr. Shehi filled out a Residual Functional Capacity Questionnaire and noted that plaintiff would have

"marked" restrictions and limitations in her ability to function on a sustained basis in a routine work setting or elsewhere (R. 346-347).

At the first hearing before the ALJ a vocational expert ("VE"), Dr. David Head was asked if a person of plaintiff's age, education and work experience could do light work, and if she had a moderate impairment in concentrating, and getting along with others would there be any jobs in she could do? He answered in the affirmative. These jobs would include general office clerk; food service; cleaning; companion/sitter; assembly type jobs, wrapping and packaging and jobs in the security guard industry (R. 54). Dr. Head also testified that if a person has a marked impairment in responding to work pressures, she would not be able to work (R. 55).

At the second hearing before the ALJ on April 2, 1997, a vocational expert, Dr. William A. Crunk, Jr. testified. Upon being asked if plaintiff did not have any exertional impairments but assuming she could at least do light work, and that she had a moderate impairment in getting along with co-workers and supervisors, and understanding, carrying out and remembering instructions, sustaining persistence, and concentrating in a work setting; would there be any jobs she could do. The VE testified affirmatively. Examples were jobs in the service industry, such as the laundry industry, sorting, spotting of clothes, hanging and operating the press machine. There would be cleaning jobs, light cleaning of office buildings and such. The estimated number of jobs would be 2000 in the North Central Alabama area. There were other jobs such as central supply jobs in hospitals, combining and putting together trays, bench work type jobs such as inspecting and sorting (R. 75). The VE testified that these jobs would be

8-hour jobs of any 40-hour-a-week jobs (R. 75-76). The VE also testified that if plaintiff had more than a moderate impairment, aside from a history of drugs, she would not be able to do any of those jobs (R. 76).

Upon examination by plaintiff's attorney, the VE testified that if plaintiff had problems with anxiety, rapid speech and minimal awareness of interpersonal impact on others, and resulting general poor judgment, and thus a marked impairment on her ability to make decisions in judgment, that she would not be able to work (R. 76). If she had marked impairment in her ability to withstand ordinary work pressure, she would not be able to do any work at all (R. 77).

Standard of Review

The initial burden of establishing disability is on the claimant, who must prove that due to a mental or physical impairment he is unable to perform his previous work. If the claimant is successful the burden shifts to the Commissioner to prove that the claimant can perform some other type of work existing in the national economy. *Walker v. Bowen*, 826 F.2d 996, 999 (11th Cir.1987).

This court's review of the factual findings in disability cases is limited to determining whether the record contains substantial evidence to support the ALJ's findings and whether the correct legal standards were applied. 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420 (1971); *Wolfe v. Chater*, 86 F.3d 1072, 1076 (11th Cir.1996); *Martin v. Sullivan*, 894 F.2d 1520, 1529 (11th Cir.1990). "Substantial evidence" is more than a scintilla, but less than a preponderance. It is generally defined as "such relevant evidence as a reasonable mind

would accept as adequate to support a conclusion." *Richardson*, 402 U.S. at 401 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206 (1938)); *Miles v. Chater*, 84 F.3d 1397 (11th Cir.1996); *Bloodsworth v. Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983).

In determining whether substantial evidence exists, this court must scrutinize the record in its entirety, taking into account evidence both favorable and unfavorable to the Commissioner's decision. *Lamb v. Bowen*, 847 F.2d 698, 701 (11th Cir.1988); *Walker v. Bowen*, 826 F.2d 996, 1000 (11th Cir. 1987). "Even if the Court finds that the evidence weighs against the Commissioner's decision, the court must affirm if the decision is supported by substantial evidence." *Allen v. Schweiker*, 642 F.2d 799, 800 (5th Cir.1981); *see also Harwell v. Heckler*, 735 F.2d 1292 (11th Cir. 1984); *Martin v. Sullivan*, 894 F.2d 1520 (11th Cir. 1990).

This court must also be satisfied that the decision of the Commissioner is grounded in the proper application of the appropriate legal standards. *McRoberts v. Bowen*, 841 F.2d 1077, 1080 (11th Cir.1988); *Bridges v. Bowen*, 815 F.2d 622, 624 (11th Cir. 1987); *Davis v. Shalala*, 985 F.2d 528 (11th Cir.1993). However, no such presumption of correctness applies to the Commissioner's conclusions of law, including determination of the proper standard to be applied in reviewing claims. *Brown v. Sullivan*, 921 F.2d 1233, 1235 (11th Cir.1991); *Cornelius v. Sullivan*, 936 F.2d 1143, 1145 (11th Cir.1991). Furthermore, the Commissioner's "failure to ... provide the reviewing court with sufficient reasoning for determining that the proper legal analysis has been conducted mandates reversal." *Cornelius*, 936 F.2d at 1145-1146.

Regulations promulgated by the Commissioner establish a five part sequential analysis to arrive at a final determination of disability. 20 C.F.R. § 416.920(a)(f). The ALJ must first determine whether the plaintiff is presently employed. If so, a finding of non-disability is mandated and the inquiry ends. 20 C.F.R. § 404.1520(b). Second, the ALJ must determine whether the plaintiff suffers from a severe impairment or combination of impairments. If not, a finding of no disability is made at this point and the inquiry ends. 20 C.F.R. § 404.1520(c). Next, the ALJ must compare the plaintiff's severe impairments to those in the listings of impairments. 20 C.F.R. § 404.1520(d). Step four requires a determination of whether the impairments, alone or in combination, prevent the plaintiff from performing his past relevant work. If so, prima facie of disability is established and the burden of going forward with the evidence shifts to the Commissioner to show, at step five, that other work exists in the national economy that the plaintiff is able to perform. 20 C.F.R. § 404.1520(e)(f).

Because a hearing before an ALJ is not an adversary proceeding, the ALJ has a basic obligation to develop a full and fair record. *Graham v. Apfel*, 129 F.3d 1420, 1422-23 (11th Cir.1997). *See also Wilson v. Apfel*, 179 F.3d 1276 (11th Cir.1999).

Legal Analysis

In the case before the court, the ALJ determined that the plaintiff was an unmarried widow, who at the time of the hearing was fifty-four (54) years old, thus being an individual closely approaching advanced age (R. 20). He correctly found that she had no past relevant work, given that she had not worked for the past twenty-eight years (R.

20-21). He found that plaintiff had the medically determinable impairments of dysphagia, hypertension, substance abuse/dependence, dependent personality, and substance induced mood disorder. The ALJ found that plaintiff's impairments, when considered in combination, neither met nor were medically equivalent to any impairment listed in Appendix 1 to Subpart Plaintiff, 20 C.F.R. Part 404. He found that plaintiff's drug abuse/dependence imposed moderately severe restrictions upon plaintiff's ability to respond to customary work pressures, and thus, prevented her from performing work at the light exertional levels. To the extent that plaintiff claimed to be more severely impaired than this, by her impairments other than drug abuse/dependence, the ALJ found that her testimony was inconsistent with and less credible than the medical evidence of record (R. 21-22). The ALJ found that plaintiff's impairments, other than her drug abuse/dependence, when considered in combination, do not prevent plaintiff from performing jobs in the light exertional level, and experience depression and anxiety lack of concentration, or deterioration in a work setting above the moderate level (R. 22). Finally, the ALJ found that plaintiff, except for her drug abuse/dependence, had not been "disabled" at any time through the date of his decision under 20 C.F.R. § 404.1520(e). Thus he found plaintiff's drug abuse/dependence material to be the determination of her disability within the meaning of 20 C.F.R. § 404.1535, and therefore ineligible for benefits under Public Law 104-121 (R. 22).

The plaintiff contends that the ALJ committed error when he found that plaintiff would not be disabled except for her drug abuse/dependence. More specifically plaintiff contends that there is no evidence in the record to establish that plaintiff is regularly engaging in ant type of drug use

other than Methadone (doc. 3 at p. 6). In support of this argument, plaintiff states that if she stopped taking Methadone, there would be a much greater likelihood that she would return to illicit drug use, than that she would not be disabled (doc. 3 at p. 8). Contrary to what is maintained by plaintiff, the fact that plaintiff is likely to return to illicit drug use if she were not on a Methadone maintenance program directly supports the ALJ's finding. The medical records reflect plaintiff's thirty years abuse of drugs and alcohol. They reflect she was placed on the Methadone maintenance program in order to withdraw from and not return to such substance abuse. Plaintiff herself testified that she was still attending the Methadone Clinic on medical advise and that she was doing "good" as long as she was on her Methadone (R. 69). Methadone is the medication used to control plaintiff's drug abuse/dependence. Even Dr. Shehi, the psychiatrist to whom plaintiff was referred by her attorney for consultative examination, recommended that plaintiff continue counseling at the UAB Methadone Clinic (R. 345). In light of plaintiff's continued need for Methadone, the ALJ properly found that she still remained with a dependence to the drugs.

Next plaintiff contends that the ALJ erred in failing to find depression and anxiety as severe impairments (doc. 3 at p. 8). In support of this argument, plaintiff argues that the medical records reflect that plaintiff has always had problems with panic attacks, anxiety, lack of concentration and depression (doc. 3 at p. 9). The plaintiff is correct that plaintiff's complaints of anxiety, depression and panic attacks are long standing (R. 70). However, the record reflects that plaintiff's depressive mood disorder is most

likely substance induced (R. 331, 345)[7]. This conclusion is further supported by the plaintiff's list of medications which does not include any medications for depression, anxiety or panic attacks (R. 314). Even Dr. Carmichael, who noted in his record of March 26, 1997 that he thought plaintiff could benefit from a prescription for depression, did not give her one, but rather encouraged plaintiff to discuss it with her treatment provider at the Methadone Clinic (R. 349). Most notably is, however, that plaintiff, in neither hearing before the ALJ, complained of depression. The records from UAB psychiatric clinic reflect that plaintiff is anxious and upset because her disability check is hung up in the system, and that she agreed it was the cause for her anxiety in the assessment (R. 325). There are further indications in the record that plaintiff knew that "getting disability on the basis of her past and present Methadone use will be chancey", and that she was "upset" because she had not gotten a check (R. 324). Dr. Feldman opined that plaintiff did not have bad depression (R. 325).[8] There is substantial objective evidence in the record

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[7] The court notes that Dr. Savage, in his Recommendation Number 4 for plaintiff, actually associates plaintiff's symptoms of depression with her use of drugs in that he recommends "Increase **drug-free pleasurable** activities. He did not prescribe an anti-depressant medication for plaintiff but rather stated that he would **consider** prescribing such, if the depressive symptoms worsen (R. 332).

[8] The records also reflect that plaintiff's complaints of this type are not of a continuous nature. She reported to Dr. Savage that her nervousness, worry, racing heart and butterflies last for 5 minutes and that her shaky spells occur every 6 weeks (R. 329).

supporting the ALJ's conclusion that plaintiff's depression is related to her substance abuse and not a separate severe impairment. This court must affirm the Commissioner's decision if it is supported by substantial evidence, *Allen v. Schweiker*, 642 F.2d 799, 800 (5th Cir.1981); *see also Harwell v. Heckler*, 735 F.2d 1292 (11th Cir.1984) and *Martin v. Sullivan*, 894 F.2d 1520 (11th Cir.1990).

Next the plaintiff contends that the ALJ erred in failing to find disability under Medical Vocational Rule 202.04 (doc. 3 at p. 9). Pursuant to 20 C.F.R. Part 404, Subpart P, App. 2, Rule 202.02, a person of advanced age, with a high school degree (or its equivalency) who is either unskilled or has no past work experience is disabled.[9] The plaintiff argues that the age category stated in Rule 202.04 should not be applied mechanically, citing *Reeves v. Heckler*, 734 F.2d 519, 525-526 (11th Cir. 1984). Reeves held that "Under the statutory scheme, once a claimant has proved that he can no longer perform his past relevant work, the burden shifts to the Secretary to prove that claimant can perform substantial gainful activity that exists in the national economy.... In discharging this burden the Secretary may use the age factor as applied in the grids as evidence of the claimant's ability to adapt to new work environment, but this age factor shall not be conclusive. If the claimant then proffers substantial credible evidence that his ability to adapt is less than the level established under the grids and must instead establish the claimant's ability to adapt to a new work environment by independent evidence." *Id.* At 525.

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[9] A person of advanced age is defined by the regulations as a person 55 years old or older.

It is noted by the court that the medical treatment records for plaintiff's physical condition fail to reveal that she has any physical limitations to performing work-related activity (R. 147-148, 151-153, 157-158, 161-164, 176-179, 270-272, 278-291, 351-362). Absent plaintiff's substance abuse, the record merely shows that plaintiff was limited to a range of light work with moderate limitations in the ability to relate to co-workers and supervisors, and in understanding, remembering, carrying out instructions while sustaining concentration in a work setting (R. 70-71). Dr. Shehi was the only health care professional who opined that plaintiff had marked restrictions and limitations in her ability to function on a sustained basis in a routine work setting (R. 346-347). However, Dr. Shehi also found that plaintiff would have no difficulty making acceptable work decisions (R. 345). The ALJ did exactly what is mandated by *Reeves*. To meet that burden the ALJ elicited vocational expert testimony at the hearings, in particular the supplemental hearing, where the VE testified that there were a significant number of jobs that plaintiff could do given her age, educational level, lack of past relevant work history and lack of former job skills, and residual functional capacity in the absence of substance abuse (R. 75). In addition, *Reeves* is distinguishable from the case at the bar in that the ALJ there solely applied the Medical-Vocational Guidelines to direct findings of not disabled, and no vocational expert testimony was elicited. Accordingly, the ALJ properly found that there existed a significant number of alternative jobs that plaintiff could do, in the absence of substance abuse.

As stated above, this court finds that sufficient evidence to support the ALJ's decision is contained in the record.

Therefore, the decision of the Commissioner is **AFFIRMED** pursuant to this opinion.

DONE and **ORDERED** this the _____ day of _____, 1999.

_____

Inge P. Johnson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LINDA WALKER,

Plaintiff,

vs.

KENNETH APFEL, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION,

Defendant.

ENTERED
NOV 4 1999

Civil Action No. CV-99-J-0677-S

ORDER

In accordance with the memorandum opinion entered by the court this day, it is hereby **ORDERED** by the court that the decision of the Commissioner is **AFFIRMED**.

DONE and **ORDERED** this the _____ day of _____, 1999.

_____
Inge P. Johnson
United States District Judge

APPENDIX A-4 – JUDGEMENT AND COURT'S OPINION FROM THE UNITED STATES ELEVENTH CIRCUIT COURT OF APPEALS BY CIRCUIT JUDGE BLACK, JUDGE HULL, AND JUDGE MARCUS ENTERED SEPTEMBER 15, 2000

United States Court of Appeals
For the Eleventh Circuit

No. 00-10125
Non-Argument Calendar

District Court Docket No. 99-00677-CV-J-S

LINDA K. WALKER,

Plaintiff-Appellant

versus

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION,

Defendant-Appellee

- - - - - - - - - - - - - - - -

Appeal from the United States District Court
for the Northern District of Alabama

- - - - - - - - - - - - - - - -

Before BLACK, HULL AND MARCUS, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the

Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT the plaintiff-appellant pay to the defendant-appellee, the costs on appeal to be taxed in accordance with Fed.R.App.P. 39.

Entered: September 15, 2000
For the Court: Thomas K. Kahn, Clerk

By:_____
Deputy Clerk

ISSUED AS MANDATE: DEC 28 2000

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
SEP 15 2000

NO. 00-10125
Non-Argument Calendar

D.C. Docket 99-00677-CV-J-S

LINDA K. WALKER,

Plaintiff-Appellant

versus

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Alabama

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(September 15, 2000)

Before: BLACK, HULL AND MARCUS, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Linda K. Walker appeals the district court's order affirming the Commissioner's denial of disability benefits under 42 U.S.C. § 423(a).[6] Walker's benefits were denied pursuant to the Contract with America Advancement Act of 1996 (the "CAAA").[7] The CAAA amended the Social Security Act to preclude the award of benefits when alcoholism or drug addiction is determined to be a contributing factor material to the determination that a claimant is disabled. On appeal, Walker argues that the CAAA should not apply to her because she had stopped abusing prescription drugs and was only taking methadone as part of a drug-treatment program. After review, we conclude that the Commissioner correctly applied the CAAA to Walker, and we affirm the denial of benefits.

I. BACKGROUND

A. ALJ HEARINGS

On February 28, 1994, Walker filed a claim for widow's disability insurance benefits on her deceased husband's account and for supplemental security insurance, alleging disability beginning on January 1, 1998. Walker claimed that she was disabled due to, inter alia, her spastic colon, depression, and forgetfulness. After the Commissioner denied her application, Walker received a

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[6] Linda Walker died on October 5, 1999, of peritonitis. Walker's mother, Lois Meyers, is entitled as next-of-kin to any disability benefits through September 1999. See 42 U.S.C. § 404(d)(3); 20 C.F.R. § 404.316.

[7] Pub. L. No. 104-121, § 105(a)(1), (b)(1), 110 Stat. 847, 852, 853 (codified as amended at 42 U.S.C. §§ 423(d)(2)(C) (1997)).

hearing before an administrative law judge (the "ALJ") on November 27, 1995. Walker requested a supplemental hearing after she received notice that Congress had passed the CAAA, and that it may be applicable to her case. Walker received a supplemental hearing on April 2, 1997.

At the time of her supplemental hearing, Walker was fifty-four years old. Walker's second husband died on December 18, 1993. Walker testified that she had completed the tenth grade, but that she later obtained her GED. Walker stayed home to raise three children, and had not worked outside the home in the last twenty-eight years. Walker did her own housework and assisted her mother with her housework. Over the course of both hearings, Walker testified that she had a spastic colon and, because of her esophagus, she had problems keeping her food down. Walker also suffered from forgetfulness and panicked in stressful situations. Walker admitted to alcohol and prescription drug abuse "for a lot of years," but stopped the drug use when she started a methadone-treatment program in 1992. Walker stopped drinking just after her husband died in 1993. She testified that she had no side effects from the methadone.

Dr. William A. Crunk, Jr., a vocational expert (the "VE"), testified that a person who was capable of light work and had moderate impairments in (1) getting along with others, (2) understanding, carrying out and remembering instructions, and (3) sustaining persistence, and concentrating in a work-setting, could find jobs in service industries like laundry and cleaning. Dr. Crunk stated, however, that if any of the claimant's impairments were more than moderate, she would not be able to perform these jobs. Dr. Crunk concluded that if Walker suffered from poor judgment, or if she had marked impairment in her ability to

withstand ordinary work pressure, she would not be able to work.[8]

B. Medical Evidence

Walker presented approximately thirty years of medical records. Because the issues in this appeal focus on Walker's mental-health conditions and do not address her physical ailments, we will recount only the records of doctors who addressed Walker's mental condition.

Dr. B.E. Blankenship, M.D., a treating psychiatrist, hospitalized Walker in 1966 for an overdose of medication while acutely intoxicated; in 1976 for anxiety, depression, and hysterical personality; in 1978 for an episode Walker thought was a grand mal seizure; and several times in 1979 and 1981 for recurrent mood depression. Dr. Blankenship diagnosed Walker with having adjustment reaction to adult life, anxiety-depressive syndrome, hysterical-dependent personality, and emotional immaturity.

After a 1979 consultation, Dr. Richard Allison diagnosed Walker with a mixture of depressive and anxiety neurosis with somatic sensitivities and personality structure basically dependent with significant hysteroid (resembling hysteria) features.

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[8] Dr. David W. Head, a VE, testified similarly at Walker's first hearing. Dr. Head concluded that if a person having Walker's characteristics had a thirty-year-plus history of anxiety, depression syndrome resulting in a moderately severe impairment of ability to withstand work pressure, and poor judgment, she would not be able to work.

Several doctors saw Walker since her January 1988 alleged disability onset date. Dr. Carmen Vargo-Moncier, Ph.D., a psychologist, saw Walker in April 1994 and diagnosed her with nicotine, alcohol, and polysubstance abuse. Dr. Vargo-Moncier noted that Walker also suffered from arthritis, spastic colon, and migraine headaches, and concluded that Walker had "poor judgment." Dr. Robert A. Walker, M.D., an internist, concluded in a 1994 disability determination that Walker's "major component is depression, anxiety, drug dependency, probable history of esophageal spasm and/or esophageal ring."

Dr. F.A. Breslin, a psychologist, evaluated Walker on August 8, 1995, and concluded that she suffered from an organic mental disorder and substance-addiction disorder, i.e., behavioral changes associated with the regular use of substances that affect the central nervous system. Dr. Breslin indicated that Walker could follow simple tasks but not detailed ones, and that she should limit contact with coworkers and the public. Dr. Breslin concluded that none of Walker's functional limitations satisfied the listings of impairments.

Dr. Robert Savage, a clinical psychologist, performed a psychological evaluation of Walker in July 1996. Dr. Savage diagnosed Walker as having, inter alia, a depressive mood disorder that was most likely substance-induced, alcohol dependence in sustained full remission, sedative dependence, and dependent personality disorder. However, Dr. Savage did not recommend treatment for her mental-health conditions. Instead, he concluded: "If depressive symptoms worsen, consider prescribing an antidepressant medication."

Dr. L. Edward Shehi, a psychiatrist, examined Walker in April 1997. Dr. Shehi diagnosed Walker with major depression with generalized anxiety features, but concluded that she "would have no difficulty making acceptable work decisions."

C. The ALJ's Decision

In his June 28, 1997, decision, the ALJ found Walker disabled. However, pursuant to the CAAA, the ALJ denied Walker's request for benefits because he determined that her drug abuse was a contributing factor material to the determination that she was disabled. The ALJ found that Walker had the following medically determinable impairments: dysphagia (difficulty when swallowing), hypertension, substance abuse/dependence in that she is currently in Methadone treatment, dependent personality, and substance induced mood disorder. The ALJ found that Walker met only Listing 12.09 addressing drug abuse: "[Walker] has no impairment, other than her drug abuse/dependence, which meets the criteria of any of the listed impairments. When all of [Walker's] impairments are considered together, her drug abuse/dependence, in that she is currently in Methadone treatment, is material to the determination of [her] disability within the meaning of [the CAAA] . . . as her impairments other than her drug abuse/dependence, when considered in combination, do not prevent her from performing work." Additionally, the ALJ found that Walker's subjective statements concerning her impairments were not credible in light of the discrepancies between her assertions and the evidence in the record.

The ALJ concluded that Walker could perform light work with only moderate limitations in relating to coworkers and supervisors, and in understanding, remembering, and

carrying out instructions in a work setting. The Appeals Council denied Walker's request for review, and thus the ALJ's decision became the Commissioner's final decision.

D. District Court

On March 22, 1999, Walker filed a complaint for judicial review in the district court. Before the district court, Walker argued (1) there was no evidence in the record establishing that she engaged in any drug use other than methadone, and accordingly, the ALJ erred in finding that she would not be disabled if she stopped taking methadone, (2) the ALJ erred in failing to find depression and anxiety as severe impairments, and (3) the ALJ erred in failing to find disability under Medical-Vocational Rule 202.04. The district court affirmed the ALJ's decision, and Walker timely appealed.

II. STANDARD OF REVIEW

This Court reviews the Commissioner's decision to determine whether substantial evidence supports the ALJ's factual findings and to ensure that the ALJ applied the correct legal analysis.[9] See Graham v. Apfel, 129 F.3d 1420, 1422 (11th Cir. 1997). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. See Falge v. Apfel, 150 F.3d 1320, 1322 (11th Cir. 1998), cert. Denied, 525 U.S. 1124 (11th Cir.

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[9] When, as in this case, the ALJ denies benefits and the Appeals Council denies review, we review the ALJ's decision as the final decision of the Commissioner. See Falge v. Apfel, 150 F.3d 1320, 1322 (11th Cir. 1998), cert. Denied, 525 U.S. 1124 (1999).

1999). In other words, substantial evidence is "more than a mere scintilla." Id.

III. DISCUSSION

An award of disability benefits involves a five-step process. The claimant must show that (1) she is not gainfully employed, (2) she is severely impaired, and (3) her impairment meets or equals a listed impairment. If the claimant makes those showings, she is considered disabled. See 20 C.F.R. § 404.1520. If the claimant's impairment does not meet or equal a listed impairment, she must continue to show that (4) she cannot do past relevant work. If the claimant establishes that she cannot do past work, then (5) the Commissioner may show that the claimant can do work based on her residual functional capacity. If the Commissioner cannot show this, the claimant is considered disabled. See, 20 C.F.R. § 404.1520; see also Reeves v. Heckler, 734 F.2d 519, 525 (11th Cir. 1984).

Nevertheless, if a claimant is found disabled and there is evidence of drug or alcohol addiction, she is not to benefits if her drug or alcohol addiction was a "contributing factor material" to the determination that she is disabled. See 42 U.S.C. § 423(d)(2)(C) (as amended by the CAAA); see also 20 C.F.R. § 404.1535 (same). To determine the materiality of the drug or alcohol abuse, the ALJ must decide what limitations would remain absent the drug or alcohol abuse. 20 C.F.R. § 404.1535 (same). To determine the materiality of the drug or alcohol abuse, the ALJ must decide what limitations would remain absent the drug or alcohol abuse. See 20 C.F.R. § 404.1535. The key factor the ALJ examines in determining whether drug addiction or alcoholism is a contributing factor material to the determination of disability is whether the claimant would

still be found disabled if she stopped using drugs or alcohol. 20 C.F.R. § 404.1535(b)(1).

A. THE CAAA's Applicability to Walker's Methadone Treatment.

On appeal, Walker argues that the ALJ erred in analyzing her case pursuant to the CAAA. Walker emphasizes that she had stopped using prescription drugs in 1992 and alcohol in 1993. At the time of the hearings, Walker claims that the only substance she was using was methadone, which was prescribed by a doctor as medical treatment for her drug addiction.

We conclude that the ALJ correctly applied CAAA in Walker's case. Walker's doctors prescribed methadone as treatment for her prescription drug abuse. Simply stated, Walker's prescription drug abuse necessitated her methadone treatment, and thus her benefits were denied. Walker's prescription drug abuse was therefore a "contributing factor material" to the determination that she was unable to work.[5] 42 U.S.C. § 423(d)(2)(C). Thus, we conclude that the ALJ properly applied the CAAA to Walker's case.

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[5] Because the ALJ determined that Walker met only the Listing of Impairment applicable to drug abuse, Walker would not have been disabled (unable to work) initially if not for her continuing drug-abuse treatment. See 20 C.F.R. Pt. 404 Subpt. P, App. A, § 12.09. Thus, we have no trouble concluding that Walker's prescription drug abuse was crucial to the finding that she was disabled.

B. Walker's Depression and Anxiety

Walker also argues that if the CAAA is applicable to her case, the ALJ erred in finding that her depression and anxiety did not render her disabled. Walker maintains that those conditions made her unable to respond to work pressure, and thus unable to work. We conclude that substantial medical evidence supports the ALJ's determination that Walker's depression and anxiety did not prevent her from performing light work. We conclude that substantial medical evidence supports the ALJ's determination that Walker's depression and anxiety did not prevent her from performing light work. For example, four mental-health specialists examined Walker after her alleged disability date of onset, Drs. Vargo-Moncier, Breslin, Savage, and Shehi, but none of them concluded that any of her mental impairments should keep her from working.

Walker testified that she could not do work due to her forgetfulness and her tendency to panic in stressful situations, but the ALJ found that Walker's testimony regarding these conditions was "inconsistent with and less credible than the medical evidence of record." The ALJ also specifically found that Walker's medical record "does not support that [Walker] has a mental impairment that could reasonably be expected to produce symptoms above the mild to moderate level." Based on the record as a whole, we conclude that the ALJ's finding is supported by substantial evidence.

C. Medical-Vocational Rule 202.04

Finally, Walker argues that the ALJ erred by not finding that she would be disabled under Medical-Vocational Rule 202.04, which applies to people of "advanced age." 20

C.F.R. Pt. 404, Subpt. P, App. 2, § 202.04. Walker was fifty-four at the time of her second hearing, but Rule 200.00 defines "advanced age" as over fifty-five. See i.d. § 200.00(f). Walker argues that the ALJ should have applied the "advanced age" grid despite her age, because her mental conditions and lack of work history made her able to adapt to new work at less than the level established under the grids for people "approaching advanced age." See i.d. § 200.00(g) (defining "approaching advanced age" as fifty to fifty-four years old).

The Medical-Vocational Guidelines (the "grids") are a series of tables which correlate the claimant's residual functional capacity (i.e., the ability despite impairments, to do sedentary, light, medium, heavy, or very heavy work), with vocational factors (e.g., age, education, and work experience) to determine whether a claimant should be found disabled. See 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00(a). When there are non-exertional impairments, such as mental impairments, that significantly limit the ability to do basic work activities, the grids cannot be the sole basis for determining disability status. See Syrock v. Heckler, 764 F.2d 834, 835 (11th Cir. 1985) (quoting 20 C.F.R. Pt. 404, subpart P, App. 2, § 200.00(e)). While the grids can still be used as framework when non-exertional impairments are present, "full consideration must be given to all of the relevant facts in the case." 20 C.F.R. Pt. 404, Subpt. Plaintiff, App. 2, §200(e)(2).

Because Walker had non-exertional mental impairments, the ALJ properly used the grids only as framework for his disability analysis. The grid applicable to those of "advanced age" would have recommended a finding of "disabled," while the "approaching advanced age," grids

by which the ALJ analyzed Walker's case, recommended a finding of "not disabled."

In Reeves v. Heckler, 734 F.2d 519 (11th Cir. 1984), cited by Walker in support of her argument, this Court concluded that the grids cannot be applied mechanically. We remanded the Reeves case because the ALJ relied on the exclusively upon the grids to find a claimant disabled without considering evidence that the claimant was less able to adapt to new work than the level established by the grids for people his age. See id. At 525-26. However, Reeves is not applicable to Walker's case because, unlike in Reeves, the ALJ in this case did not base his decision exclusively on the grids. Instead, the ALJ used the grids as a framework for his analysis, but he also sought testimony from the VE. To obtain the information necessary to reach his decision, the ALJ posed a hypothetical to the VE listing the limitations – including mental disabilities – that Walker claimed she had. The ALJ then obtained the VE's opinion regarding whether someone with those characteristics would be able to work. Therefore, we conclude that the ALJ complied with his duty under §200(e)(2) to give full consideration to all relevant facts.

We also conclude that substantial evidence supported the ALJ's decision to apply the grid applicable to people "approaching advanced age," i.e., fifty to fifty-four years old. 20 C.F.R. Pt. 404, Subpt. P, App.. 2, §200(g). For the reasons stated above in support of the ALJ's decision that Walker's mental conditions did not limit her ability to work, we conclude that her mental conditions did not render her less able to adapt to new work conditions than other fifty-four year olds. Therefore, the ALJ did not error by failing to

apply the grid governing those of "advanced age," which would have recommended a finding of "disabled."[6]

III. CONCLUSION

We conclude that (1) the CAAA was applicable to Walker's case, (2) the ALJ did not error in finding that Walker's depression and anxiety did not render her unable to perform light work, and (3) the ALJ did not error in applying the grid for those "approaching advanced age."

AFFIRMED.

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[6] Walker also argues that the district court erred in concluding that if she stopped taking methadone, she would return to drug abuse and alcoholism. The ALJ, however, did not make such a statement, and this was not the factual scenario the ALJ had before him. At all material times in this case, Walker was continuously taking methadone as treatment for her past substance abuse. Since the ALJ did not rely on what would happen if Walker stopped her methadone treatment, we do not address this argument.

Relying on a directive from the Social Security Administration, Walker also argues that if alcoholism and an underlying mental condition cannot be separated, then the alcoholism should not be found to be a material contributing factor to her disability. We decline to address this issue because Walker failed to raise it before the district court. See Stewart v. Dept. of Health and Human Services, 26 F.3d 115, 115-16 (11th Cir. 1994).

APPENDIX A-5 – DENIAL OF PETITION FOR REHEARING EN BANC BY CIRCUIT JUDGE BLACK, JUDGE HULL, AND JUDGE MARCUS ENTERED DECEMBER 8, 2000

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 00-10125-GG

LINDA K. WALKER,

Plaintiff-Appellant

versus

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION,

Defendant-Appellee

- - - - - - - - - - - - - - - -

On Appeal from the United States District Court for the Northern District of Alabama

- - - - - - - - - - - - - - - -

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19__, _____F.2d____).

Before: BLACK, HULL AND MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel no other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

APPENDIX B-1 – CONTRACT WITH AMERICA ADVANCEMENT ACT OF 1996 PUBLIC LAW 104-121 SECTION 105(B)(1).

H.R. 3136

Contract with America Advancement Act of 1996(Enrolled Bill (Sent to President)

SEC. 105. DENIAL OF DISABILITY BENEFITS TO DRUG ADDICTS AND ALCOHOLICS.

(a) AMENDMENTS RELATING TO TITLE II DISABILITY BENEFITS-

(1) IN GENERAL – Section 223(d)(2) of the Social Security Act (42 U.S.C. 423(d)(2)) is amended by adding at the end the following:

(C) An individual shall not be considered to be disabled for purposes of this title if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled.

APPENDIX B-2 – 20 C.F.R. 404. 1535

§ 404.1535 How we will determine whether your drug addiction or alcoholism is a contributing factor material to the determination of disability.

(a) General. If we find that you are disabled and have medical evidence of your drug addiction or alcoholism, we must determine whether your drug addiction or alcoholism is a contributing factor material to the determination of disability.

(b) *Process we will follow when we have medical evidence of your drug addiction or alcoholism.* (1) The key factor we will examine in determining whether drug addiction or alcoholism is a contributing factor material to the determination of disability is whether we would still find you disabled if you stopped using drugs or alcohol

(2) In making this determination, we will evaluate which of your current physical and mental limitations, upon which we based our current disability determination, would remain if you stopped using drugs or alcohol and then determine whether any or all of your remaining limitations would be disabling.

(i) If we determine that your remaining limitations would not be disabling, we will find that your drug addiction or alcoholism is a contributing factor material to the determination of disability.

(ii) If we determine that your remaining limitations are disabling, you are disabled independent of your drug addiction or alcoholism and we will find that your drug addiction or alcoholism is not a contributing factor material to the determination of disability.

APPENDIX B-3 – 20 C.F.R. 416.937(c)

§ 416.937(c) What we mean by appropriate treatment.

By appropriate treatment, we mean treatment for drug addiction or alcoholism that serves the needs of the individual in the least restrict setting possible consistent with your treatment plan. These settings range from outpatient counseling services through a variety of residential treatment settings including acute detoxification, short-term intensive residential treatment, long-term therapeutic residential treatment, and long-term recovery houses. Appropriate treatment is determined with the involvement of a State licensed or certified addiction professional on the basis of a detailed assessment of the individual's presenting symptomatology, psychosocial profile, and other relevant factors. This assessment may lead to a determination that more than one treatment modality is appropriate for the individual. The treatment will be provided or overseen by an approved institution or facility. This treatment may include (but is not limited to)-

(a) Medical examination and medical management;
(b) Detoxification;
(c) Medical management to include substitution therapy (e.g., methadone);

APPENDIX C-1 – CORRESPONDENCE FROM NOSSCR DATED SEPTEMBER 28, 2000

NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANT'S REPRESENTATIVES
(NOSSCR)
6 PROSPECT STREET
MIDLAND PARK, NEW JERSEY 07432

NANCY G. SHOR
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(201) 444-1415
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BARBARA R. SILVERSTONE
STAFF ATTORNEY

ETHEL ZELENSKE
DIRECTOR, GOVERNMENT AFFAIRS

September 28, 2000

Marilyn H. Macey, Esq.
Clark & James
Suite 817 Frank Nelson Building
205 20th Street North
P.O. Box 638
Birmingham, AL 35201-0638

Dear Marilyn:

This is a follow-up to our discussion about the Eleventh Circuit decision in Walker v. Apfel. I am enclosing the Congressional Record on this law, which does not discuss methadone specifically. I am also enclosing some memo from SSA indicating that use of methadone is neither an automatic denial nor an automatic finding of disability. Instead, each case should be evaluated individually to determine

whether the claimant would be disabled if the drug use stopped.

In your case, the court misapplied the standard for evaluating disability for an individual who has a drug addiction. The court appeared to find that the mere fact that she was taking methadone, or that she abused prescription drugs, forced a finding of non-disability. The judges did not consider the effects of her other impairments. The correct standard is to first determine whether the individual is disabled, taking into consideration all of her impairments. If the individual is disabled, the next step is to remove those limitations caused by her drug abuse. If the remaining impairments are disabling, the individual is entitled to benefits, regardless of her continued drug use. Causation is also irrelevant. Even if the disabling impairment (such as her peritonitis, which eventually killed her) was caused by her drug use, she is still entitled to disability benefits if the disability would continue when the drug use stopped.

• • •

Please let us know what happens in this case.

Sincerely,

Barbara Silverstone

APPENDIX C-2 – MEDICAL POLICY CLARIFICATION STATEMENT DATED JULY 20, 1995 ISSUED BY THE SOCIAL SECURITY ADMINISTRATION'S DIRECTOR, DISABILITY PROGRAM BRANCH

SOCIAL SECURITY ADMINISTRATION
DISABILITY PROGRAM BRANCH
JOHN FITZGERALD KENNEDY FEDERAL BUILDING
BOSTON, MASSACHUSETTS 02203

JUL 20 1995

IDENTICAL LETTER: 55-95

TO: All DDS Administrators, Boston Region

FROM: Director, Disability Program Branch

SUBJECT: Medical Policy Clarification—
DAA Materiality Decision When Claimant is in a Methadone Treatment Program

• • •

The information in this transmittal should not be interpreted to mean that mere participation in a methadone treatment program mandates an allowance on the basis of ongoing substance abuse. Conversely, methadone treatment is not, in itself, a basis for a denial. Each situation must be evaluated on the basis of the specific facts of the case, taking into account the history, symptoms, clinical signs, treatment, functional restrictions, and effects of any co-existing impairments.

Thomas Finigan

APPENDIX C-3 – GLIN GUIDE, UNITED STATES, PART 13: PUBLIC LAWS OF 104TH CONGRESS

UNITED STATES OF AMERICA

Public Laws enacted by the 104th Congress [1995-1996]

Part 13 – Public Laws 104-121 through 104-130

Public Law 104-121 (110 STAT.847)

"Contract with America Advancement Act of 1996" – Contains three titles dealing with three different subjects, some portions of which bear names as separate acts. **Title I** deals with various aspects of Social Security and Medicare, including limits on employment by those receiving old-age benefits, reviews of disability payments, and benefits to children through stepparents, and for "elimination of benefits to those using drugs unlawfully".

Supreme Court, U.S.
FILED
JUL 11 2001
OFFICE OF THE CLERK

No. 00-1571

In the Supreme Court of the United States

LINDA K. WALKER, PETITIONER

v.

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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11 pp

QUESTION PRESENTED

The Social Security Act precludes the award of Social Security disability benefits when alcoholism or drug addiction is a contributing factor material to the determination that the claimant is disabled. 42 U.S.C. 423(d)(2)(C), 1382c(a)(3)(J) (Supp. V 1999). The question in this case is whether the Social Security Administration properly denied petitioner Social Security disability benefits after finding that petitioner's abuse of prescription drugs, which required methadone treatment, was a contributing factor material to the determination that she is disabled.

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In the Supreme Court of the United States

No. 00-1571

LINDA K. WALKER, PETITIONER

v.

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. No. A-4) is unpublished, but the decision is noted at 234 F.3d 34 (Table).[1] The opinion of the district court (Pet. App. No. A-3) is unreported. The opinions of the Administrative Law Judge (Pet. App. No. A-1) and the Appeals Council (Pet. App. No. A-2) are also unreported.

[1] The pages marking Appendices Nos. A-3 and A-4 appear to have been omitted inadvertently from the petition appendix. In addition, the pages of Pet. App. No. A-3 are not numbered. We count the first page of the Memorandum Opinion in that appendix as page 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. No. A-4) was entered on September 15, 2000. A petition for rehearing was denied on December 8, 2000 (Pet. App. No. A-5). The petition for a writ of certiorari was filed on March 8, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. The federal government provides benefits to disabled persons under programs administered by the Social Security Administration (SSA). The Social Security Disability Insurance (SSDI) program established by Title II of the Social Security Act provides for the payment of such benefits to the disabled widow of an insured individual. 42 U.S.C. 402(e)(4). Title XVI of the Social Security Act, Pub.L. No. 92-603, 86 Stat. 1465 (42 U.S.C. 1381 *et seq.*), establishes the Supplemental Security Income (SSI) program, which extends benefits to indigent disabled persons. Both titles define "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A); 42 U.S.C. 1382c(a)(3)(A) (1994 & Supp. V 1999).

In 1996, Congress amended the Social Security Act to preclude the award of SSDI and SSI benefits when alcoholism or drug addiction materially contributes to the claimed disability. The 1996 amendments provide: "[A]n individual shall not be considered to be disabled for purposes of this title if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination

that the individual is disabled." Contract With America Advancement Act of 1996, Pub. L. No. 104-121, § 105(b)(1), 110 Stat. 853 (42 U.S.C. 423(d)(2)(C), 1382c(a)(3)(J) (Supp. V 1999)).

2. In 1994, petitioner filed a claim for SSDI and SSI benefits, alleging a disability beginning on January 1, 1988.[2] Pet. App. No. A-1, at 1; Pet. App. No. A-3, at 1. After SSA denied petitioner's application, petitioner requested and received a hearing before an administrative law judge (ALJ), including a supplemental hearing after Congress amended the Social Security Act to address alcohol and drug use in 1996. Pet. App. No. A-4, at 2-3.

The hearing testimony established that petitioner was 54 years old and had the equivalent of a high school education. Petitioner had not worked outside of the home since 1988. However, she did housework for herself and for her mother. Petitioner testified that she had a spastic colon and problems keeping down food. Petitioner also testified that she was forgetful and panicked in stressful situations. Petitioner had abused alcohol and prescription drugs for many years, but she testified that she stopped drinking in 1993 and stopped abusing drugs in 1992, when she started methadone treatment. Petitioner testified that she was taking methadone and had no side effects from the treatment. Pet. App. No. A-4, at 3. A vocational expert testified that a person who was capable of light work and had impairments of the type described by petitioner could

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[2] Petitioner died in October 1999. Pet. App. No. A-4, at 2 n.6. Petitioner's mother, as next-of-kin, is entitled to any potential SSDI disability benefits due to petitioner through September 1999. See 42 U.S.C. 404(d)(3). Petitioner's claim for unpaid SSI benefits did not survive her death. See 42 U.S.C. 1383(b)(1)(A).

find jobs in service industries such as laundry and cleaning, provided that the impairments were only of moderate severity. *Id.* at 3-4.

Medical evidence indicated that petitioner had a history of drug and alcohol abuse and dependence and also intermittent treatment for various physical conditions. Pet. App. No. A-4, at 4-6. Several doctors diagnosed petitioner as having a drug dependency and being a drug abuser. *Id.* at 4-5. In addition, petitioner suffered from arthritis, a spastic colon, migraine headaches, and a probable history of esophageal spasm and/or esophageal ring. *Id.* at 5. One psychiatrist, who examined petitioner in 1997, diagnosed her as having major depression with anxiety, but concluded that she "would have no difficulty making acceptable work decisions." *Id.* at 6.

The ALJ found that petitioner's drug abuse was a disabling condition, but that she was ineligible for benefits due to the 1996 amendments. Pet. App. No. A-1, at 12-13. The ALJ concluded that absent petitioner's drug abuse, she could perform a significant number of jobs. Therefore, the ALJ determined that petitioner was not eligible for benefits. *Ibid.*

The Appeals Council denied petitioner's request for review of the ALJ's decision. Pet. App. No. A-2.

3. The district court affirmed the ALJ's decision. Pet. App. No. A-3. The district court concluded that petitioner was taking methadone to control her dependence on prescription drugs. *Id.* at 18. In light of petitioner's continued need for methadone, the district court held, the ALJ properly found that petitioner was still dependent on prescription drugs. *Ibid.* The court also found that the record supported the ALJ's conclusion that petitioner's depression was related to drug abuse and was not a separate severe impairment. *Id.* at

18-20. Finally, the court concluded that the ALJ properly found that there existed a significant number of jobs that petitioner could do in the absence of her substance abuse. *Id.* at 20-21.

4. The court of appeals affirmed. Pet. App. No. A-4. The court rejected petitioner's claim that, because she had stopped using prescription drugs and alcohol, the 1996 amendments concerning alcohol and drug use did not apply to her case. It found that petitioner's doctors "prescribed methadone *as treatment* for her prescription drug abuse," and that "prescription drug abuse necessitated her methadone treatment." *Id.* at 9. Benefits therefore were properly denied, the court concluded, because petitioner's prescription drug abuse was "a 'contributing factor material' to the determination that she was unable to work." *Ibid.* (quoting 42 U.S.C. 423(d)(2)(C) (Supp. V 1999)).

The court of appeals also upheld, as supported by substantial record evidence, the ALJ's finding that petitioner's depression and anxiety did not independently render her disabled. Pet. App. No. A-4, at 10. Finally, the court of appeals held that the ALJ did not err in failing to find that petitioner was disabled by virtue of the combination of her age, mental conditions, and lack of work history. *Id.* at 10-13.

ARGUMENT

1. Petitioner claims (Pet. 7-10, 14-15) that the court of appeals erred by "finding that methadone addiction in the course of prescribed treatment constitutes drug and alcohol abuse" (Pet. 14) for purposes of applying the Social Security Act's restriction on disability benefits. The court of appeals, however, made no such finding. It instead made clear that petitioner took methadone "*as treatment* for her prescription drug abuse," and that

the addiction that disqualified petitioner from disability benefits (for the period before she started taking methadone in 1992 as well as the period after she began treatment) was an addiction to prescription drugs. Pet. App. No. A-4, at 9 & n.5. The court of appeals' ruling is consistent with the 1996 amendments, and with SSA regulations that identify methadone treatment as an acceptable form of substitution therapy. See Pet. 10 (citing 20 C.F.R. 416.937(c)).[3]

For the foregoing reasons, the court of appeals' decision does not implicate the question presented by petitioner—"whether methadone addiction in the course of prescribed treatment properly falls under the ambit of drug and alcohol abuse" under the 1996 amendments. Pet. i. Petitioner, moreover, has not suggested that the decision in this case conflicts with any decision of another court of appeals or of this Court. Accordingly, and because the court of appeals' opinion is unpublished, further review by this Court is unwarranted.

2. Although the petition should be denied, we note that footnote 5 of the court of appeals' decision (Pet. App. No. A-4, at 9 n.5) suggests that the court of appeals may have had an incorrect understanding of the ALJ's decision. The ALJ did not hold that petitioner's methadone treatment contributed to her disability after 1992. As the court of appeals noted, petitioner testified that she had no side effects from Methadone. *Id.* at 3. And the ALJ referred to petitioner's methadone use as

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[3] Also contrary to petitioner's assertion (Pet. 11), the court of appeals did not rely on the assumption that petitioner would revert to prescription drug and alcohol abuse if she stopped methadone treatment. The court of appeals expressly did not consider that theory. Pet. App. No. A-4, at 13 n.6.

"treatment" that established the ongoing nature of her impairing drug "abuse/dependence," not as an impairment in its own right that prevented her from working. See Pet. App. No. A-1, at 8, 9; see also Pet. App. No. A-3, at 18 ("Methadone is the medication used to control plaintiff's drug abuse/dependence.").

The ALJ's decision does not clearly state whether, when her drug addiction is considered, petitioner was able to work after she began methadone treatment in 1992. The ALJ did find, however, that to the extent petitioner was unable to work at any time during the period between January 1, 1988 (the first date for which she claimed benefits) and June 28, 1997 (the date of the ALJ's decision), it was because of her drug abuse or drug dependence. See Pet. App. No. A-1, at 9 ("[H]er impairments, other than her drug abuse/dependence, when considered in combination, do not prevent her from performing work."); *id.* at 10 (same). Since petitioner's use of methadone was a treatment that had no side effects, Pet. App. A-4, at 3, any inability to perform work (either before or after petitioner began taking methadone) was attributable to her underlying drug addiction, and thus could not qualify as a disability under the 1996 amendments. See 42 U.S.C. 423(d)(2)(C), 1382c(a)(3)(J) (Supp. V 1999).

3. Petitioner argues (Pet. 12-13) that she was disabled even without consideration of her drug addiction. That issue is not included within the question on which petitioner seeks a writ of certiorari. See Pet. i. Furthermore, the ALJ's fact-bound determination that, aside from her addiction, petitioner was able to work—a determination that the court of appeals upheld (Pet. App. No. A-4, at 10-13)—turns entirely on the administrative record generated before the SSA and presents no issue warranting review by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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